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Supreme Court of the United States

October Term, 1974
No. .....

ARTIE MAHALEY, *et al.*,
Petitioners,

vs.

CUYAHOGA METROPOLITAN HOUSING AUTHORITY, *et al.*,
Respondents,

and

CITY OF EUCLID, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioners, Artie Mahaley, *et al.*, respectfully pray that a Writ of Certiorari issue to review the judgment of the Sixth Circuit Court of Appeals entered in this proceeding on July 9, 1974, upon which Petitioners' Petition for Rehearing was denied August 14, 1974.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals, appended hereto at page A1, is reported at 500 F.2d 1087.

The opinion of the three judge District Court herein, appended hereto at page A34, is reported at 355 F. Supp. 1245.

The opinion and order of the single judge District Court on the questions of law raised herein, appended hereto at page A58, is reported at 355 F. Supp. 1257.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on July 9, 1974. A timely filed Petition for Rehearing was denied on August 14, 1974.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Was there a final appealable order when the single judge District Court ruled that petitioners had made a prima facie case of racial discrimination and ordered respondent Cuyahoga Metropolitan Housing Authority officials to submit a plan for dispersal of low rent housing units?

2. Was the Court of Appeals correct in ruling that the three judge District Court's determination of constitutionality under Count One of petitioners' Complaint was res judicata on the matters raised in Count Two of the Complaint?

3. Was the Court of Appeals correct in ruling that the District Court lacked jurisdiction over the respondent municipal officials under 42 U.S.C. § 1983?

4. Was the Court of Appeals correct in reversing the District Court's ruling that petitioners had made a prima facie case of racial discriminatory effect resulting from actions of local governmental officials?

STATUTE INVOLVED

42 United States Code § 1415(7): Local Responsibilities and Determinations.

(7) In recognition that there should be local determination of the need for low-rent housing to meet needs not being adequately met by private enterprise—

(a) The Authority shall not make any contract with a public housing agency for preliminary loans (all of which shall be repaid out of any moneys which become available to such agency for the development of the projects involved) for surveys and planning in respect to any low-rent housing projects initiated after March 1, 1949, (i) unless the governing body of the locality involved has by resolution approved the application of the public housing agency for such preliminary loan; and (ii) unless the public housing agency has demonstrated to the satisfaction of the Authority that there is a need for such low-rent housing which is not being met by private enterprise; and

(b) The Authority shall not make any contract for loans (other than preliminary loans) or for annual contributions pursuant to this chapter with respect to any low-rent housing project initiated after March 1, 1949, (i) unless the governing body of the locality involved has entered into an agreement with the public

housing agency providing for the local cooperation required by the Authority pursuant to this chapter; (ii) unless the public housing agency has demonstrated to the satisfaction of the Authority that a gap of at least 20 percentum (except in the case of a displaced family or an elderly family) has been left between the upper rental limits for admission to the proposed low-rent housing and the lowest rents at which private enterprise unaided by public subsidy is providing (through new construction and available existing structures) a substantial supply of decent, safe, and sanitary housing toward meeting the need of an adequate volume thereof.

STATEMENT OF THE CASE

This is a class action brought on behalf of persons residing in, or eligible to reside in, federally subsidized low rent housing in the greater Cleveland, Ohio area; the majority of those persons are Negroes. Also a party plaintiff is the PATH Association, an Ohio corporation not for profit formed to increase the quantity and quality of housing in the greater Cleveland, Ohio area and to make that housing available to all persons without regard to racial or religious considerations. Jurisdiction exists under 28 U.S.C. §§ 1343(3), 1343(4) and 1331(a).

The defendants in this suit were five suburban municipalities in Cuyahoga County, Ohio ("suburban Cities"); the respective mayor and councilmen of the suburban Cities (the "respondent municipal officials"); the Cuyahoga County Metropolitan Housing Authority ("CMHA"); the CMHA Director and Board members (the "respondent CMHA officials"); and the Department of Housing and Urban Development and its Secretary. It was later deter-

mined that jurisdiction under 42 U.S.C. § 1983 did not exist over the suburban Cities or over CMHA.

Count One of the Complaint seeks a declaration that the cooperation agreement requirement of the Housing Act of 1937, as amended, 42 U.S.C. § 1415(7)(b)(i), is unconstitutional on its face and in its natural execution. Count Two of the Complaint seeks a declaration that the respondent municipal officials have used the cooperation agreement requirement in an unlawful and unconstitutional manner to exclude low rent housing and Negroes from their respective cities, and asks for equitable relief under 42 U.S.C. §§ 1401, et seq., 42 U.S.C. § 2000d, 42 U.S.C. §§ 1981, 1982 and 1983, and 42 U.S.C. §§ 3601, et seq.

A three judge District Court was convened and heard the evidence upon both Counts One and Two of the Complaint. The three judge panel found the cooperation agreement requirement to be constitutional, one judge dissenting, and granted summary judgment against petitioners on Count One. *Mahaley v. Cuyahoga Metropolitan Housing Authority*, 355 F. Supp. 1245 (N.D. Ohio 1973). The three judge panel remanded the case to one of its members, Judge Battisti, for ruling on Count Two of the Complaint.

Based on a substantial record, Judge Battisti found petitioners had made a prima facie showing that the cooperation agreement requirement had been used by respondent municipal officials to deny access to their cities by low income Negroes and to perpetuate racial segregation in Cuyahoga County, Ohio. *Mahaley v. Cuyahoga Metropolitan Housing Authority*, 355 F. Supp. 1257 (N.D. Ohio 1973). Judge Battisti's order was a limited one—it directed respondent CMHA officials to submit a plan reflecting the need, if any, for low income housing in each of the suburban Cities and directed that any objections or counter-

proposals to that plan be filed by any of the other parties within 90 days after the filing of the CMHA officials' plan. The respondent municipal officials appealed Judge Battisti's order to the United States Court of Appeals for the Sixth Circuit. Petitioners' motion to dismiss the appeal for lack of a final order was overruled by the Court of Appeals. The Court of Appeals reversed Judge Battisti's decision, one judge dissenting, and remanded the case to the District Court for dismissal. Petitioners' motion for reconsideration to the Sixth Circuit Court of Appeals was denied.

The declared statutory purpose of the Housing Act of 1937, 42 U.S.C. §§ 1401, et seq., was "to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of low income." 42 U.S.C. § 1401. To achieve this purpose, the Act provided that the federal government would provide funds to state housing authorities for the construction, maintenance and operation of housing units to be occupied by low income families.

Ohio passed enabling legislation under the federal law, Ohio Revised Code §§ 3735.01 et seq., which created a State Board of Housing as the administrative agency. The Board was authorized to create local metropolitan housing authorities whenever it found a need—that is, where the Board found unsanitary or unsafe inhabited housing in an area, or found a shortage of safe and sanitary housing available to low income persons. Ohio Revised Code § 3735.27. A determination by the Board of the need for low rent housing in the Cuyahoga County, Ohio area resulted in the creation of CMHA.

CMHA is a political subdivision of the State of Ohio, Ohio Revised Code § 3735.50. CMHA is charged by Ohio

statute to provide housing for low income persons, Ohio Revised Code § 3735.31, and is the state agency to receive federal funds under the United States Housing Act of 1937. CMHA has jurisdiction in all municipalities in Cuyahoga County, Ohio, except the Village of Chagrin Falls.

Under the Housing Act of 1937, as amended, 42 U.S.C. § 1415(7)(b)(i), CMHA cannot use federal funds for the development of low rent housing in any municipality within its territorial jurisdiction without the consent of the governing body of the municipality. This is the "cooperation agreement" requirement of the federal low rent housing law, so named because it spells out the ways in which a municipality will cooperate with the state housing agency—for example, in the provision of customary municipal services to the low rent housing. For the purpose of obtaining such cooperation agreements, at various times starting in 1969 CMHA officials communicated with each of the suburban Cities, and with the other municipalities within its jurisdiction, in an attempt to interest them in the development of low rent housing in their communities. These communications were for the most part with the chief executive officials of the suburban Cities and took the form of letters and brochures and formal and informal oral explanations.

CMHA has entered into several cooperation agreements with the City of Cleveland and that City has had CMHA housing for many years. Only three suburbs in Cuyahoga County—East Cleveland, Oakwood, and Cleveland Heights—responded to CMHA's efforts and have entered into cooperation agreements with CMHA. The only low rent housing actually built by CMHA outside the City of Cleveland is 193 units in East Cleveland, a first ring suburb adjacent to Cleveland on the east with a substantial Negro population. The evidence showed that

none of the respondent municipal officials ever even considered a cooperation agreement with CMHA.

Thus, the State of Ohio created the State Board of Housing. The State Board of Housing determined a need for low-rent housing in Cuyahoga County, and created CMHA. CMHA, charged by Ohio law to provide housing to low income persons, requires financial help available under the United States Housing Act. Before CMHA can receive federal funds, there must be a cooperation agreement between CMHA and the municipality in which the housing is to be located. But with a few exceptions, the suburbs in Cuyahoga County will not sign, or even consider, a cooperation agreement with CMHA.

It is the persistent refusal of respondent municipal officials to sign cooperation agreements with CMHA which the District Court found had resulted in racial discrimination and the perpetuation of racial segregation in housing in Cuyahoga County.

Judge Battisti ruled,

> "In view of the factual showings of the almost all white character of the suburbs, the high percentage of Negroes in CMHA housing and on CMHA waiting lists, and the need for low income housing both on a community and on a metropolitan basis, the refusals or failures to respond to CMHA's requests to initiate public housing were intended to, and have had the effect of excluding Negroes and perpetuating racial segregation contrary to the national housing policy." *Mahaley* v. *Cuyahoga Metropolitan Housing Authority*, 355 F. Supp. 1257, at 1263

The "factual showings" made in the uncontradicted evidence and relied on by Judge Battisti in making this finding of racial discrimination were these:

1. 87% of Cuyahoga County's 328,419 Negroes live in the City of Cleveland, and 96% of the Negro residents of the City of Cleveland reside on the east side of the City of Cleveland. Of the 40,578 Negroes residing in suburbs of Cuyahoga County, 80% are confined to three suburbs which are immediately adjacent to Negro areas of the City of Cleveland. The Negro populations of the suburban Cities range from 0% to 4.3%.

2. Of the 26,873 persons living in existing CMHA units, 18,943, or 70.5%, are Negro. At the time of the hearing there were 5,652 applications pending with CMHA for its housing, and 73% of those applicants were Negro; 4,040 of the total pending applications were for family units, as opposed to elderly housing units, and 86% of these applications on the CMHA waiting list for family units were from Negroes.

3. Almost all low rent housing developed by CMHA is concentrated on the near east side of the City of Cleveland in areas which are predominately Negro. The confinement of CMHA housing to those areas of the City of Cleveland means the residents, who are predominately Negro, must live in areas with the highest crime rates, areas with the highest unemployment rates, areas having inadequate transportation to job opportunities, and areas with racially segregated schools which offer inferior educational opportunities.

4. Many present residents of CMHA housing came from suburban communities, and many suburban residents are presently on the waiting list for CMHA housing. There are persons living in each of the suburban Cities who qualify for CMHA housing.

5. There is a present need for additional units of CMHA housing, both in terms of the numbers of persons who require such housing and in terms of the quality of the available housing stock.

ARGUMENT IN SUPPORT OF GRANTING WRIT

I. THE ORDER APPEALED FROM IS NOT A FINAL ORDER WITHIN THE MEANING OF 28 U.S.C. § 1291.

Under 28 U.S.C. § 1291 Federal Courts of Appeal have jurisdiction of appeals from "all final decisions of the district courts." The order of the single judge District Court which was appealed to the United States Court of Appeals for the Sixth Circuit was not a final order within 28 U.S.C. § 1291 so as to vest jurisdiction in the Court of Appeals. At most, the order determined that petitioners had made a prima facie case of local governmental action resulting in racial discrimination.

Judge Battisti ordered respondent CMHA officials to prepare a plan for the creation of low rent housing in the suburban Cities; the order then allowed respondent municipal officials 90 days within which to show why the respondent CMHA officials' plan should not be implemented, or to offer an alternative plan. Thus, Judge Battisti, made a prima facie finding against the respondent municipal officials, but his order provided respondent municipal officials the opportunity to rebut the prima facie finding. Litigation in which no relief has been granted and in which the defendants were to be given a second opportunity to present evidence can hardly be said to have come to its end. *Bohms v. Gardner*, 381 F.2d 283 (8th Cir. 1967).

The Court of Appeals relied on *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 13 L.Ed.2d 199 (1964) in accepting jurisdiction of this matter. *Gillespie* permits appeals of decision which are not technically final orders

but which are "marginal cases" falling within the "twilight zone" of finality. 379 U.S. 148, at 152. A marginal order will fall within that twilight zone of finality only if the order sought to be reviewed is fundamental to the further conduct of the case and the inconvenience and costs of piecemeal review are outweighed by the danger of denying justice by delay. 379 U.S. 148, at 153-154. See also, *Clark* v. *Kraftco Corp.*, 447 F.2d 933, 935 (2nd Cir. 1971).

Judge Battisti's order here is not even close to finality. The order is not fundamentally prejudicial to respondent municipal officials. To the contrary, the District Court's order gave the respondent municipal officials a second chance to present evidence negating the prima facie showing made by petitioners. Both the Sixth Circuit and the Second Circuit have ruled that an order to submit this kind of plan is not a final order. *Bradley v. Milliken*, 468 F.2d 902 (6th Cir. 1972), *cert. den'd*, 409 U.S. 844, 34 L.Ed.2d 83 (1972); *Taylor v. Board of Education of New Rochelle*, 288 F.2d 600 (2nd Cir. 1961).

In his dissent in *Gillespie*, Justice Harlan with Justice Stewart concurring points out that the statutory language of 28 U.S.C. § 1291 is mandatory—a final order is a jurisdictional prerequisite. The dissent makes clear that *Gillespie* creates exceptions to the rules of finality which must be strictly adhered to by Courts of Appeal. In the present case, the Court of Appeals stretched the exceptions to finality created in *Gillespie* beyond the intent of the Supreme Court.

II. THE RULING OF THE THREE JUDGE PANEL WAS NOT RES JUDICATA AS TO MATTERS RAISED IN COUNT TWO OF THE COMPLAINT AND DECIDED BY THE SINGLE JUDGE DISTRICT COURT.

Petitioners' Complaint was in two counts. Count One alleged that 42 U.S.C. § 1415(7)(b) violated the Fifth Amendment to the United States Constitution because on its face it discriminates on the basis of economics and because in its own natural operation it results in racial discrimination. Count Two alleged that respondent municipal officials used 42 U.S.C. § 1415(7)(b) in a racially discriminatory manner in violation of petitioners' rights under the Fourteenth Amendment and various federal civil rights acts.

A three judge District Court ruled 42 U.S.C. § 1415(7)(b) constitutional and granted a summary judgment against petitioners on Count One of the Complaint. Judge Lambros dissented and would have held the statute unconstitutional on its face.

The three judge panel then remanded the issues raised in Count Two of the Complaint to Judge Battisti, sitting alone. At issue in this appeal is the order of the single judge District Court. Judge Battisti's order was made upon a finding that the respondent municipal officials had violated petitioners' rights under 42 U.S.C. §§ 1981, 1982, 1983, 2000d and 3601 et seq.

In reversing Judge Battisti's order under Count Two of the Complaint, the Court of Appeals said there was nothing left for the single judge District Court to do but dismiss the claims under 42 U.S.C. § 1983 since the three judge District Court had ruled 42 U.S.C. § 1415(7)(b) constitutional "on its face and as applied." The Court

of Appeals misinterprets the words "as applied" used by the three judge District Court.

It is clear from a reading of the three judge District Court opinion that its use of "as applied" did not refer to the respondent municipal officials' use of 42 U.S.C. § 1415(7)(b) but rather to the natural consequences of that statute. A statute which specifically classifies by race is unconstitutional on its face. A statute constitutional on its face but discriminatory in its own natural and inevitable operation would be unconstitutional "as applied". See *Gomillion v. Lightfoot*, 364 U.S. 339, 5 L.Ed. 2d 110 (1960) and *Reitman v. Mulkey*, 387 U.S. 369, 18 L.Ed.2d 830 (1967).

The three judge Court ruled the statute constitutional on its face, and further ruled the statute constitutional as applied—that is, in its natural and inevitable execution. As stated by the Court at 355 F. Supp. 1245, 1250:

> "The result of Section 1415(7)(b)(i) is not necessarily racial discrimination. The racial effect of this statute, if any, is not caused by the statute itself but rather by municipal action or inaction which may have used this provision as a shield to protect its inhabitants from integration by low-income Negroes."

Only Count Two of the Complaint brought into issue the respondent municipal officials' use of 42 U.S.C. § 1415(7)(b) to effect racial discrimination. And in remanding the case to Judge Battisti the three judge District Court specifically said it was not "reaching any determination of the merits of Count Two" of the Complaint:

> "Having determined that 42 U.S.C. § 1415(7)(b) is constitutional both on its face and as applied, we find no further questions which are required to be heard by this three judge court. The question of

> whether the defendants' conduct violated the provisions of 42 U.S.C. § 1983 is not a proper matter for a three judge court. Therefore, without reaching any determination of the merits of Count Two of each complaint, this court remands consideration of those claims to Chief Judge Frank J. Battisti. . ." 355 F. Supp. 1245, 1250.

The Court of Appeals was clearly wrong in holding that the three judge District Court had decided the issues raised under Count Two of petitioners' Complaint—the misuse of 42 U.S.C. § 1415(7)(b) by the respondent municipal officials. A reading of the opinion of the three judge District Court can lead to no other result. This conclusion is particularly unavoidable from the fact that both opinions below were written by Judge Battisti. Certainly Judge Battisti, in writing the opinion of the three judge panel, did not believe Count Two of the Complaint was thereby disposed of, for he would not then have proceeded to deal with Count Two in his careful one judge opinion. The view of the Court of Appeals turns the action of the single judge District Court into an exercise in futility, and is not common sense.

The Court of Appeals' interpretation of "as applied" is incongruous for another reason. The three judge District Court restricted itself to Count One of the Complaint, which was premised on a claim of unconstitutionality under the Fifth Amendment. To rule, as the Court of Appeals did, that the three judge panel found the respondent municipal officials' use of the statute constitutional means that such use was measured under the Fifth Amendment. But claimed equal protection denials by state officials can only be measured under the Fourteenth Amendment, not the Fifth Amendment.

III. JURISDICTION OVER THE RESPONDENT MUNICIPAL OFFICIALS UNDER 42 U.S.C. § 1983 WAS PROPER

Judge Battisti's ruling below was in February, 1973. In April, 1973, the United States Supreme Court decided in *City of Kenosha v. Bruno*, 412 U.S. 507, 37 L.Ed.2d 109 (1973) that a municipality was not a "person" for purposes of jurisdiction under 42 U.S.C. § 1983. The petitioners, accordingly, conceded in their brief and oral argument to the Court of Appeals that there is no jurisdiction here over the five suburban Cities under 42 U.S.C. § 1983. The Court of Appeals agreed, but went further to hold there is no jurisdiction here under 42 U.S.C. § 1983 over the respondent municipal officials. This was error.

The Court of Appeals correctly stated that actions under 42 U.S.C. § 1983 will lie against individual government officials. But the Court then held there was no jurisdiction over these respondent municipal officials on the ground that Judge Battisti's order was addressed only to the five suburban Cities and not to their officials. This is not so. Throughout his opinion on Count Two Judge Battisti refers to all defendant suburban Cities and the respondent municipal officials as "defendants", and in his order allows the respondent municipal officials as defendants to respond to the plan of the respondent CMHA officials. Of course, there is initially no order against any respondent municipal official since Judge Battisti's order directs only respondent CMHA officials to act, with the other parties being permitted then to file objections or counterproposals to the respondent CMHA officials' plan.

Of greater importance, Judge Battisti specifically finds the respondent municipal officials responsible for the racially discriminatory pattern of housing in Cuyahoga County.

> "This Court is faced with a dilemma of some constitutional significance. It is clear that state officials are acting under color of law and are performing acts which have, at the very least, discriminatory effect. However, the law they are using to perpetuate discrimination is a federal rather than a state law. State officials are refusing to sign a federally required document with the resulting effect of discrimination." 355 F. Supp. 1257, 1268.

This is not a case where respondent municipal officials were joined as party defendants in an attempt to circumvent the rulings in *City of Kenosha v. Bruno, supra*; *Moor v. County of Alameda*, 411 U.S. 693, 36 L.Ed.2d 596 (1973); and *Monroe v. Pape*, 365 U.S. 167, 5 L.Ed.2d 492 (1961). While these cases hold that political entities are not persons under 42 U.S.C. § 1983, each case recognizes that officials of political entities are persons under 42 U.S.C. § 1983. The respondent municipal officials were defendants from the start of this lawsuit. They are the real parties in this suit for it was their refusal even to consider the execution of a cooperation agreement with CMHA which is at the heart of Count Two of the Complaint. See *United Farmworkers of Florida Housing Project v. City of Delray Beach*, 493 F.2d 799 (1974).

Judge Edwards, in dissenting from the majority view of the Court of Appeals, viewed the ruling on jurisdiction over the municipal officials as one of the most important questions in this case. Petitioners agree. The majority's interpretation of 42 U.S.C. § 1983 would render that statute nugatory. Section 1983 confers jurisdiction for acts under color of law. But how can one obtain jurisdiction under Section 1983 for actions under color of law at a municipal level if the statute applies neither to the municipality nor to those officials who act in its name?

The concern of a majority of the Court of Appeals of a transgression of separation of powers is not germane to the order under review. Petitioners agree that to order "individual councilmen to vote for a cooperation agreement" would violate the separation of powers concept. But no such order has been made and no such order is before this Court. Relief can be granted to petitioners on Count Two of their Complaint without ordering respondent municipal officials to vote for a cooperation agreement with CMHA. Quite simply, the District Court could order CMHA officials to build public housing units in the suburban Cities without the need of a cooperation agreement.

IV. THE DISTRICT COURT'S FINDINGS OF RACIAL DISCRIMINATION RESULTING FROM RESPONDENT MUNICIPAL OFFICIALS' ABUSE OF THE COOPERATION AGREEMENT REQUIREMENT WAS PROPER.

The single judge District Court found that petitioners had proved a prima facie case of racial discrimination. In simple terms, the District Court held that the respondent municipal officials' abuse of the cooperation agreement requirement of 42 U.S.C. § 1415(7)(b) racially discriminated against petitioners. The petitioners are "tenants and applicants for low-income housing, the vast majority of whom are Negro." 355 F. Supp. 1245, 1246.

Judge Battisti's finding of racial discrimination was based on substantial, uncontradicted evidence. The racially discriminatory effect here is that members of the petitioners' class, each of whom require low rent housing in order to secure decent, safe and sanitary living accommodations, are required to live in the hub city of Cuyahoga County—Cleveland—and the CMHA housing available to

them in Cleveland is largely confined to those areas which are predominately Negro. The resulting discriminatory effect was described by the Court as follows:

> "Being relegated to live in the decaying center of a city is tragic indeed. Its effects are legion—segregated schools of poor quality, denial of access to jobs, ineffective health services, generally poorer health, higher rate of infant mortality—the list seems endless." 355 F. Supp. 1257, 1260.

In reversing the District Court's ruling of racially discriminatory effect, the Court of Appeals relied primarily on *Palmer v. Thompson*, 403 U.S. 217, 29 L.Ed.2d 438 (1971) and *Citizens Committee for Faraday Wood v. Lindsay*, 362 F. Supp. 651 (S.D. N.Y. 1973), appeal docketed, No. 73-2590, 2nd Cir., Oct. 2, 1973. The Court of Appeals was wrong in its interpretation of *Palmer v. Thompson*, and should not have relied on *Faraday Wood*.

The Court of Appeals says of *Palmer v. Thompson*:

> "The Court (this Court in *Palmer v. Thompson*) held that a neutral policy which had a greater impact on a minority was not invalid on that basis." Appendix, p. A11. (Parenthesis added.)

Palmer v. Thompson did not so hold with respect to *state* action. The Supreme Court in *Palmer v. Thompson* never even spoke to this issue.

In discussing the record before it, this Court in *Palmer v. Thompson* stated at p. 225, "It shows no state action affecting blacks differently from whites." See also the concurring opinion of Justice Blackman at p. 229 and the dissenting opinion of Justice Douglas at p. 235. The Court then held, based on that record, that the state action

of closing the pools for economic reasons was a neutral act, equally affecting blacks and whites, so that any discrimination resulting from the opening of the pools on a segregated basis was purely private action and as such beyond the reach of the prohibitions of the Fourteenth Amendment. In the present case, however, it is precisely the state action of the respondent municipal officials—their refusal to enter into cooperation agreements—and not other private actions which resulted in racial discrimination.

The Court of Appeals was also wrong in relying on *Citizens Committee for Faraday Wood v. Lindsay, supra*, because that case formulated a test to determine whether or not a racial discriminatory effect results from actions of local governmental officials which is totally unsupported in the law. The Court in *Faraday Wood* said:

> "In view of *Valtierra* [*James v. Valtierra*, 402 U.S. 137, 28 L.Ed.2d 678 (1971)] and *Palmer*, it appears that in housing, for a racially discriminatory effect to be found, there must be some showing that a policy or activity which has a racially discriminatory effect results from a prior pattern of discrimination or that such policies affect only racial minorities." 362 F. Supp. 651, at 659.

The *Faraday Wood* Court misreads *Palmer*, as did the Court of Appeals, as saying that a neutral policy having a greater impact on a minority is not thereby invalid. As shown above, *Palmer* did not so hold as to *state* action.

The *Faraday Wood* Court's reliance on *James v. Valtierra, supra*, is also wrong. *Valtierra* did not involve claimed state action resulting in discrimination against a racial minority. *Valtierra*, like Count One of petitioners'

Complaint, involved a claim that Article XXXIV of the California Constitution was unconstitutional on its face because it discriminated on economic grounds and unconstitutional as applied because in its own natural operation it discriminated against racial minorities. This Court stated in *Valtierra*:

> "The Court below erred in relying on Hunter [*Hunter v. Erickson*, 393 U.S. 385, 21 L.Ed.2d 616 (1969)] to invalidate Article XXXIV. *Unlike the case before us,* Hunter rested on the conclusion that Akron's referendum law denied equal protection by placing special burdens on racial minorities within the governmental process." 402 U.S. 137, at 140. (Emphasis added.)

And further, 402 U.S. 137, at 141:

> "Unlike the Akron referendum provision it cannot be said that California's Article XXXIV rests on 'distinctions based on race.' . . . And the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority."

Faraday Wood incorrectly interprets *Valtierra* and *Palmer* for neither case suggests, much less holds, that a racially discriminatory effect can be found only if such is the result of prior patterns of discrimination or affects only racial minorities.

Petitioners are not asserting a right to live in adequate housing. *Lindsey v. Normet*, 405 U.S. 56, 31 L.Ed.2d 36 (1972). Petitioner Mahaley, a long time tenant of CMHA housing, has adequate housing; but her adequate housing, like most of CMHA's units, is confined to a predominately Negro neighborhood in the City of Cleveland. The right petitioner Mahaley and the other petitioners assert is to housing on a non-segregated and non-discriminatory basis. The single judge District Court ruled that petitioners had

made a prima facie showing that the respondent municipal officials' use of the cooperation agreement requirement in 42 U.S.C. § 1415(7)(b) had perpetuated racial housing segregation in Cuyahoga County, Ohio.

Judge Battisti's finding of racially discriminatory effect was clearly supported by the evidence. Cuyahoga County, Ohio is racially segregated with 87% of the County's Negroes residing in the central city of Cleveland. The City of Cleveland itself is racially segregated with 96% of its Negro population residing on the east side of the Cuyahoga River. This racial segregation in housing has resulted in racial segregation in the schools so that 95% of the Negro children attending public schools in Cleveland attend schools which are all, or substantially all, Negro.

The residents of the five suburban Cities are almost entirely Caucasian. In four of those suburbs the residents were from 99.1% to 99.8% Caucasian. The fifth suburb had Negro residents constituting 4.6% of its total population, but all but two of those residents lived in a section of that suburb immediately adjacent to the City of Cleveland.

The uncontradicted evidence before the District Court further showed that over 70% of the present tenants of CMHA housing units were Negroes, and 73% of the 5,652 pending applications for CMHA housing were by Negroes.

The Court of Appeals did not set aside the clear and well supported findings of the District Court. Instead, the Court of Appeals passed over those findings by asserting, in the language of *Faraday Wood*:

> "The single Judge made no findings of a prior pattern or practice of discrimination of the suburbs against racial minorities, or that the failure or refusal of the

municipalities to sign cooperation agreements affected racial minorities in Cleveland any differently than other ethnic groups living in that inner city. The Judge has not pointed out any evidence of purposeful discrimination of each of the municipalities against racial minorities." Appendix, p. A14.

But the ultimate fact remains that the great majority of petitioners' class are Negroes and they are forced to live in segregated housing because the respondent municipal officials continue to use the cooperation agreement requirement as a means to perpetuate racial housing segregation in Cuyahoga County, Ohio. And the legal conclusion remains that petitioners have made a prima facie case of resulting racially discriminatory effect for which there is judicial remedy. Judge Battisti was not out on a judicial limb in this conclusion. He relied on, and is supported by a substantial body of case law. The Court of Appeals for the 2nd Circuit so held in *Kennedy Park Homes Assn. v. Lackawanna*, 436 F.2d 108 (2nd Cir. 1970), *cert. den'd*, 401 U.S. 1010, 28 L.Ed.2d 546 (1971); the 3rd Circuit Court of Appeals so held in *Shannon v. HUD*, 436 F.2d 809 (3rd Cir. 1970); the 5th Circuit Court of Appeals so held in *Crow v. Brown*, 457 F.2d 788 (5th Cir. 1972) and *Hawkins v. Town of Shaw*, 437 F.2d 286 (5th Cir. 1972); the 7th Circuit Court of Appeals so held in *Gautreaux v. Chicago Housing Authority*, 436 F.2d 306 (7th Cir. 1970), *cert. den'd*, 402 U.S. 922, 28 L.Ed.2d 661 (1971); the 10th Circuit Court of Appeals so held in *Dailey v. Lawton*, 425 F.2d 1037 (10th Cir. 1970); and the District of Columbia Circuit so held in *Smuck v. Hobsen*, 408 F.2d 175 (D.C. Cir. 1969). In each of these cases the Circuit Court of Appeals ruled that if actions of governmental officials have a racially discriminatory effect, those suffering that discriminatory effect will find redress in the constitutional guaranty of equal protection and in the various federal

civil rights statutes. See also *S.A.S.S.O. v. City of Union City*, 424 F.2d 291 (9th Cir. 1970). And since Judge Battisti's ruling, the 5th and 7th Circuit Courts of Appeals have reaffirmed that rule of law. See *United Farmworkers of Florida Housing Project v. City of Delray Beach, supra, and Gautreaux v. Chicago Housing Authority,* ..... F.2d ....., Slip Opn. nos. 74-1048 and 74-1049 (7th Cir. Aug. 26, 1974).

Judge Battisti also relied on one of his own prior cases which had been affirmed in part and reversed in part by the Sixth Circuit Court of Appeals. *Banks v. Perk*, 341 F. Supp. 1175 (N.D. Ohio 1972), *aff'd in part, rev'd in part*, 473 F.2d 910 (6th Cir. 1973). The part affirmance by the Sixth Circuit Court of Appeals occurred after this Court's decision in *Palmer v. Thompson*, and added the Sixth Circuit to those Circuits holding that actions causing a racially discriminatory effect will be enjoined as violative of the 14th Amendment and 42 U.S.C. § 1983. As here, the District Court in *Banks v. Perk* did not specifically find that the action of governmental officials affected racial minorities in Cleveland any differently than they affected other ethnic groups living in Cleveland. Nevertheless, the Court of Appeals in *Banks v. Perk* agreed that the actions of municipal officials had a racially discriminatory effect.

The legal conclusion at stake here is well stated in *Crow v. Brown*, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd supra*, and quoted by Judge Battisti:

> "For better or worse, both by legislative act and judicial decision, this nation is committed to a policy of balanced and dispersed public housing. (citations omitted). Among other things, this reflects the recognition that *in the area of public housing local authorities can no more confine low-income blacks to a com-*

pacted and concentrated area than they can confine their children to segregated schools." 355 F. Supp. 1257, at 1263 (emphasis in original).

Judge Battisti found the respondent municipal officials' use of the cooperation agreement requirement of 42 U.S.C. § 1415(7)(b) has had exactly that effect of confining petitioners "to a compacted and concentrated area" of racially segregated housing. The Court of Appeals was wrong in disregarding that finding.

CONCLUSION

Petitioners believe the Court of Appeals lacked jurisdiction over this matter since the District Court had not entered a final order. The lack of a final order is not changed just because the Court of Appeals declared it did have jurisdiction and proceeded to review the District Court's Order. This Court has permitted limited exceptions to the requirement of a final order but those exceptions do not stretch to include the District Court's order below.

Beyond the jurisdiction infirmity, the Court of Appeals' decision contains additional errors; each of which warrants granting this petition for writ of certiorari. First, the Court of Appeals' holding that the three judge District Court's summary judgment on Count One of petitioners' Complaint was res judicata on Count Two of the Complaint is totally unsupported in the opinion of the three judge District Court. (It is submitted that this issue is so clearly erroneous that summary reversal would be appropriate.)

Second, the Court of Appeals was in error in finding no jurisdiction over respondent municipal officials under 42 U.S.C. § 1983. This error stretches far beyond the

matters at hand. Section 1983, which has been the primary vehicle for implementing the guarantees of the Fourteenth Amendment, would be rendered inoperative against local governmental officials if the holding of the Court of Appeals is allowed to stand.

Third, substantial and uncontradicted evidence and case law support the District Court's ruling that a prima facie case of racial discrimination had been made here. The Court of Appeals did not set aside the District Court's findings nor rule the cases relied upon by the District Court improper. Rather, the Court of Appeals erroneously reversed the District Court's ruling in reliance on two cases, neither of which is controlling.

For the foregoing reasons, petitioners submit that the petition for writ of certiorari here presented should be granted.

Respectfully submitted,

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MICHAEL RODAK, JR.

Supreme Court of the United States

October Term, 1974

No. 74-562

ARTIE MAHALEY, *et al.*,
Petitioners.

vs.

CUYAHOGA METROPOLITAN HOUSING AUTHORITY, *et al.*,
Respondents.

and

CITY OF EUCLID, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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APPENDIX

OPINION OF THE COURT OF APPEALS

(Filed July 9, 1974)

No. 73-1407

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTIE MAHALEY, *et al.*,
Plaintiffs-Appellees,

v.

CUYAHOGA METROPOLITAN HOUSING AUTHORITY, *et al.*,
Defendants-Appellees,

and

CITY OF EUCLID, *et al.*,
Defendants-Appellants.

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

Before: WEICK, EDWARDS and PECK, Circuit Judges

WEICK, J. delivered the opinion of the Court, in which PECK, J., joined. EDWARDS, J. (pp. A15-A26) filed a dissenting opinion.

WEICK, Circuit Judge. This appeal involves a controversy over low-rent housing under the United States Housing Act of 1937, as amended, 42 U.S.C. § 1401, *et seq.*

Plaintiffs are three Cleveland residents, who claim to be eligible for public housing, and an association interested in public housing, named The PATH. They filed an action in the District Court on March 15, 1971 against Cuyahoga Metropolitan Housing Authority (CMHA), a public housing agency, its Board and Executive Director, the municipalities of Euclid, Garfield Heights, Parma, Solon and Westlake (all suburbs of Cleveland) and their respective Mayors and councilmen, and the Department of Housing and Urban Development of the United States (HUD) and its Secretary, George Romney. Later the Court ordered that the case proceed as a class action.

The class alleged to be represented by the individual plaintiffs was "low income residents of the Greater Cleveland Ohio area, who by virtue of their poverty or race, or both, are unable to secure decent, safe and sanitary housing at rents which they can afford without the assistance of defendant CMHA." None of the three named individual plaintiffs resided in any of the five defendant municipalities. One of the individual plaintiffs, Mahaley, resides in a CMHA project in Cleveland.

Under the Act, before low-rent housing may be constructed in a given municipality there must be a local determination of need and "the governing body of the locality involved . . . [must have] entered into an agreement with the public housing agency providing for the local cooperation required by the Authority pursuant to this chapter . . . ."[1]

---

1. 42 U.S.C. § 1415(7)(a)(i), (ii), and (b)(i) provide:

(7) In recognition that there should be local determination of the need for low-rent housing to meet needs not being adequately met by private enterprise—

(a) The Authority shall not make any contract with a public housing agency for preliminary loans (all of which

(Continued on following page)

In the first count of the complaint the plaintiffs attacked the constitutionality of the consent and cooperation agreement requirement of the Act.

Count two of the complaint alleged that the five municipalities had used the consent and cooperation agreement requirements of the Act as a means to exclude the plaintiffs and the classes they represent from living in these municipalities, in violation of their civil rights and of the Fourteenth Amendment to the Constitution of the United States.[2]

Footnote Continued—

> shall be repaid out of any moneys which become available to such agency for the development of the projects involved) for surveys and planning in respect to any low-rent housing projects initiated after March 1, 1949, (i) unless the governing body of the locality involved has by resolution approved the application of the public housing agency for such preliminary loan; and (ii) unless the public housing agency has demonstrated to the satisfaction of the Authority that there is a need for such low-rent housing which is not being met by private enterprise; and
>
> (b) The Authority shall not make any contract for loans (other than preliminary loans) or for annual contributions pursuant to this chapter with respect to any low-rent housing project initiated after March 1, 1949, (i) unless the governing body of the locality involved has entered into an agreement with the public housing agency providing for the local cooperation required by the Authority pursuant to this chapter; . . . .

2. It is significant that no resident of any of the five municipalities has joined with the plaintiffs in this action.

There are some 56 cities and villages in Cuyahoga County within the jurisdiction of CMHA. It has built low-rent housing only in Cleveland and East Cleveland under cooperation agreements duly authorized. It has cooperation agreements with two other municipalities in the county. The plaintiffs have selected only the five municipal defendants out of remaining suburbs for low-rent housing projects, and primarily for the benefit of residents of Cleveland. It is of course unusual for residents of one municipality to bring an action in a Federal Court to force low-rent housing by judicial fiat on other municipalities, in which they do not reside, and which may not either need or want low-rent housing.

Plaintiffs prayed for an order directing CMHA to construct low-rent housing units in the five suburbs despite the consent requirement by the suburbs' governing bodies as provided in subsection 7(a)(i) of the Act, and the cooperation agreement requirement of subsection 7(b)(i) of the Act.

A three-Judge Court (Circuit Judge Celebrezze and District Judges Battisti and Lambros) was convened to consider the constitutional aspects of the case. There was a trial before the three-Judge Court and the case was submitted to it on the evidence which included stipulations, exhibits and depositions.

The three-Judge Court, in a signed Memorandum Opinion and Order stamped filed by the Clerk of the District Court on February 22, 1973 at 11:06 o'clock, a.m., found and determined that the cooperation agreement requirement of the Act (subsection 7(b)(i)) was "constitutional both on its face *and as applied . . .*" (Emphasis added.) The order then dissolved the three-Judge panel and referred the case to a single Judge (Chief Judge Battisti) to determine "[t]he question of whether the defendants' conduct violated the provisions of 42 U.S.C. Sec. 1983 . . ." District Judge Lambros dissented. No appeal to the Supreme Court was taken from that order and it has become final and is res judicata of the issues decided.

On the same day, about an hour later, at 12:14 o'clock p.m., there was filed with the Clerk of the District Court a 25-page Memorandum Opinion and Order of the single Judge, in which he completely disposed of the issue referred to him by the three-Judge panel without further argument or hearing. 355 F. Supp. 1257 (N.D. Ohio 1973).

The single Judge recognized that there had been remanded to him only the one question, whether plaintiffs' rights under Section 1983 had been violated. He stated:

> The question remaining before the Court is whether the defendants have used the consent requirement as a tool to perpetuate segregation in violation of 42 U.S.C. § 1983. (*Id.* at 1259)

In his Memorandum Opinion and Order, however, the single Judge found that the defendant suburbs had committed a prima facie violation of the Fourteenth Amendment to the Constitution by their failure to enter into a cooperation agreement with CMHA to build low-rent, federally-assisted housing in their communities.

On the issue of constitutionality, which had already been decided in favor of the suburbs by the three-Judge panel, the Judge stated:

> Where there is *prima facie* evidence of discrimination, the burden is shifted to the defendant suburbs to come forward with a supervening necessity or compelling governmental interest to avoid a finding of unconstitutionality. (*Id.* at 1266).

The Judge then inferred discrimination on the part of the suburbs because of their failure and refusal to enter into cooperation agreements. He further stated:

> The evidence amply demonstrates that the suburban defendants' failures and refusals to contract, negotiate with CMHA, or enter into Cooperation Agreements, have the clear effect of discriminating against Negroes by excluding them from residing in these suburban municipalities and perpetuating existing racial concentration and segregation within the individual suburbs and throughout the metropolitan area. In the face of this evidence, the suburban defendants came forward with no logical rationale, compelling or otherwise, to explain their conduct. The record

> indicates that the actions of the defendant suburbs under color of law, discriminate against Negroes and other low income persons. Such actions violate the plaintiffs' rights to equal protection of the law under the Fourteenth Amendment to the United States Constitution and are in violation of their rights under the various Civil Rights Acts. See 42 U.S.C. Sections 1981, 1982, 1983, 2000d and 3601 et seq. (*Id.* at 1266-1267).

The Judge further said:

> The foregoing is contrary to the Thirteenth Amendment and the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution, the Civil Rights Act of 1964 and 1968, Title 42 U.S.C. Sections 1981, 1982, 1983, 2000d and 3601 et seq., the United States Housing Act of 1937 as amended, and regulations of the Department of Housing and Urban Development. (*Id.* at 1268)

The single Judge further stated:

> State officials are refusing to sign a federally required document with the resulting effect of discrimination. (*Id.* at 1268)

In his judgment order the single Judge granted a rather unique form of relief. He treated the case before him like a school desegregation case and ordered CMHA "to prepare a plan setting forth the number of scattered site units it intends to place in each of the defendant suburbs." The plan was required to include not only the residents of the suburbs but also "residents of the City of Cleveland who wish to move into that community." (*Id.* at 1269).

The order required the municipalities to object to the plan within ninety days and to give reasons if they have any why then cannot absorb the number of houses which

CMHA desires to build there. The order further provided:

> Unless the reasons . . . are constitutionally permissible and meet the compelling interest test, there will be no alternative but to conclude that the suburb's failure to sign a Cooperation Agreement is for a constitutionally impermissible reason, to wit: racial discrimination and appropriate judicial action will be undertaken. (*Id.* at 1269)[3]

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3. Our colleague, in his dissent, asserts that this clear and definite order is merely "tentative" and "interlocutory", and that we really had no jurisdiction to hear this appeal.

This issue was laid to rest when shortly after the appeal had been filed we unanimously entered the following Order denying appellee's motion to dismiss the appeal:

"Before Weick, Edwards and Peck, Circuit Judges.

"Upon consideration it is ORDERED that the motion to dismiss the appeal be and it is hereby denied. *Gillespie v United States Steel Corp.*, 379 U.S. 148 (1964).

"It is further ordered that this appeal be advanced for hearing before the panel, on its merits, during the final week of the February, 1974 Session of this Court.

"Appellants shall file their brief and appendix within twenty (20) days after the date of entry hereof, and appellees shall file their brief within twenty (20) days thereafter."

After oral argument and submission, our colleague unilaterally brought up the matter again in his dissenting opinion. The question of jurisdiction, however, can be raised at any time.

Gillespie indicated that an appellate court should give consideration to four factors in determining whether an order of a lower court is "final" within the meaning of 28 U.S.C. § 1291:

1— Whether an order is final depends on whether it has been given a "practical rather than technical construction," *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

2— Whether an order is final depends on whether the issue appealed is fundamental to the further conduct of the litigation in the lower court.

3— Whether an order is final depends on whether the parties will be put to additional expenses if the appealed issue is not resolved by the appellate court.

(Continued on following page)

The five municipalities appealed. We reverse.

The rulings of the single Judge and his order conflict with the decision of the three-Judge panel, and also conflict with the decision of the Supreme Court in *James v. Valtierra*, 402 U.S. 137 (1971), where the court stated:

> By the Housing Act of 1937 the Federal Government has offered aid to state and local governments for the creation of low-rent public housing. However, the federal legislation does not purport to require that local governments accept this or to outlaw local referendums on whether the aid should be accepted. (*Id.* at 140)

Footnote Continued—

4— In cases where the issue of finality is close or marginal, the court of appeals should find in favor of finality.

Applying these factors to the present case, it is clear that the appeal of the five municipalities should not be dismissed for lack of jurisdiction under 28 U.S.C. § 1291. The order from which the appeal was taken was indeed final.

First, as to practical effect, while the District Court did not at that time actually order the five municipalities to sign a cooperation agreement, it did hold that the municipal defendants had to show a "compelling necessity" why they had not signed. The Court went on to reject all the reasons which the defendants might possibly advance as meeting that "compelling necessity" test.

Second, there can be no doubt that the issue of whether the municipalities have violated 42 U.S.C. § 1983 by their failure to determine their need for public housing and to sign cooperation agreements, is fundamental to the further conduct of this case. Similarly, the question of jurisdiction of the District Court over the municipalities and CMHA and over the subject matter is also fundamental to the disposition of the case.

Third, the great inconvenience and the cost and expense of a second trial is all-important to the municipalities, particularly since the trial record contains all of the evidence necessary for this Court to make a full and complete disposition of all of the issues in this case. The single Judge did not need any additional evidence to make his findings of constitutional violation and remedial order, all of which were prepared and filed almost contemporaneously with the order of the three-Judge Court. All that was necessary to be done was for CMHA to prepare a plan for the low cost public housing in the five municipalities, for the Cleveland residents, and for the municipalities then to approve it

(Continued on following page)

The Court recognized that the people of a community have the right to decide whether they want low-rent housing, stating:

> The people of California have also decided by their own vote to require referendum approval of low-rent public housing projects. This procedure ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues. It gives them a voice in decisions that will affect the future development of their own community. This procedure for democratic decisionmaking does not violate the constitutional command that no State shall deny to any person "the equal protection of the laws." (*Id.* at 142-143)

The Supreme Court thus construed the plain language of the Act to mean exactly what it says, namely, that it is for the municipalities to decide whether they need low-

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Footnote Continued—

or to show good cause for not doing so. The consent of the governing bodies of the municipalities, which is required by the Act as a condition precedent for the housing loans, is completely abrogated by the Order. This consent requirement was held mandatory by our decision in *Cuyahoga Metropolitan Housing Authority v. Harmody*, 474 F.2d 1102 (6th Cir. 1973). In our opinion, the findings of discrimination by the Court are not supported by substantial evidence and are clearly erroneous.

Fourth, the issue of finality in the present case is not even close. In *Bradley v. Richmond School Board*, ... U.S. ..... (No. 72-1322, May 15, 1974), the Supreme Court recently reaffirmed the basic teachings of *Gillespie*:

> "This Court has been inclined to follow a "pragmatic approach" to the question of finality. *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962). And we have said that a final decision, within the meaning of § 1291, "does not necessarily mean the last order possible to be made in a case." *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964); see *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 545 (1949)." (Fn. 28, Slip Opin., at p. 25)

rent housing and whether they desire to sign cooperation agreements. There is no basis to infer discrimination upon the part of a municipality for doing what it has a lawful right to do under the express provisions of the housing Act.

We think the three-Judge Court was clearly right in ruling as it did that the Act was not only constitutional, but that it was constitutionally applied by the municipalities. It has now become final because the plaintiffs have not prosecuted an appeal to the Supreme Court.

The findings of a violation of the plaintiffs' Section 1983 rights are also utterly inconsistent with the decision of the three-Judge panel, made only about one hour earlier. Plaintiffs could have a cognizable Section 1983 claim only if they could show that the Act was unconstitutional or that it had been unconstitutionally applied by local officials. Once the statute was held valid on its face and as applied by the five municipalities, there was no way in which a Section 1983 case could be maintained; the only proper thing then for the single Judge to do with the Section 1983 claim was to dismiss it.

We are of the opinion further that there was a lack of jurisdiction over the municipalities on the Section 1983 claim because they cannot be considered as "persons". *City of Kenosha v. Bruno*, 412 U.S. 507 (1973); *Moor v. County of Alameda*, 411 U.S. 693 (1973); *Monroe v. Pape*, 365 U.S. 167 (1961); *Johnson v. City of Cincinnati*, 450 F.2d 796 (6th Cir. 1971).

We do not doubt that Section 1983 actions may lie against individual government officials to restrain them from violating the constitution. *Egan v. City of Aurora*, 365 U.S. 514 (1961), and *Birnbaum v. Trussell*, 347 F.2d 86 (2d Cir. 1965).

Here the order appealed from was not an order against *individual councilmen, but was an order only against the* five municipalities. The rulings of the Supreme Court in *City of Kenosha, Moor,* and *Monroe* cannot be circumvented by joining with the municipalities, as parties defendant, the individual members of their governing bodies, against whom no relief was sought. The single Judge granted relief only against the five municipalities and CMHA.

In oral argument one of counsel for appellees even went so far as to suggest that the single Judge could order individual councilmen to vote for a cooperation agreement. While this course of action might have been a way to order relief without exceeding jurisdictional bounds, we think such action would have been highly improper. Quite simply, it would have been a violation of the separation of powers with the court acting as a legislature. We do not regard city councilmen, mayors, or managers, as state officers.

In our opinion plaintiffs have failed to prove that any of their constitutional rights were violated. The mere fact that the defendant municipalities have not consented to the project and have not entered into cooperation agreements does not prove a violation of constitutional rights of anyone.

In *Palmer v. Thompson,* 403 U.S. 217 (1971), the city of Jackson, Mississippi, decided to cease operation of segregated municipal swimming pools that it had been operating. The Supreme Court found there was clearly state action in the closing of the pools, but could find no denial of equal protection of the law. The Court held that a neutral policy which had a greater impact on a minority was not invalid on that basis.

The minority groups in *Palmer* relied heavily on the motives of those who closed the swimming pools; however, the Supreme Court was willing to look only to the impact of the action taken, not to motives.

In the present case the failure of the suburbs to provide low-rent housing affected alike both low-income blacks and whites. There may have been a greater impact on the blacks, but that, under *Palmer*, it not sufficient to establish a constitutional violation.

In *Lindsey v. Nomet*, 405 U.S. 56 (1972), the Court held that no one has a constitutional right to adequate housing. Since a person has no right to public housing in his own city, it follows that he has no such right in a municipality in which he does not reside.

See also Ranjel v. City of Lansing, 417 F.2d 321 (6th Cir. 1969), *cert. denied*, 397 U.S. 980, *rehearing denied*, 397 U.S. 1059 (1970), on neutral action of referendum.

In *Citizens Comm. for Faraday Wood v. Lindsay*, 362 F. Supp. 651 (S.D.N.Y. 1973), suit was filed against the City of New York, the Housing and Development Administration of the City (HDA), and John Lindsay, then Mayor of the City, alleging racial discrimination by refusing to approve an application for construction of a housing project in violation of Section 1983 and other civil rights statutes, as well as in violation of the Fair Housing Law, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601, *et seq.* The District Court followed *City of Kenosha v. Bruno*, 412 U.S. 507 (1973), holding that the Court has jurisdiction under 28 U.S.C. § 1343 of the individual defendants only and not of the City nor HDA. The Court, in considering its jurisdiction under the Federal Housing Law and Title VIII of the Civil Rights Act of 1968, held that in the denial of the application for housing, which

similarly affected whites as well as blacks, there was no racial discrimination. In so holding the Court relied on *Palmer* and *Valtierra, supra.*

It is significant that the Court in *Citizens Comm. for Faraday Wood* specifically rejected the decision of the single Judge in the present case. The Court in that case said:

> To the extent that other cases, including most recently Mahaley v. Cuyahoga Metropolitan Housing Authority, 355 F.Supp. 1245 (N.D.Ohio 1973), take a contrary position, this Court must respectfully disagree. In view of *Valtierra* and *Palmer*, it appears that in housing, for a racially discriminatory effect to be found, there must be some showing that a policy or activity which has a racially discriminatory effect results from a prior pattern of discrimination or that such policies affect only racial minorities. To the extent that other courts have carried the idea of "discriminatory effect" in the housing field further, this Court rejects the position they have espoused while again noting that the decisions turned on their individual facts. To hold that any action or failure to act is unconstitutional because it has an adverse effect on minorities, even though it affects members of the majority as well—albeit to a lesser degree—would be carrying the idea of discriminatory effect too far. Under such an approach a governmental unit could never stop a program for entirely sound reasons even at an early talking stage if it would deprive minorities of something they would have had if the program came to fruition. (362 F.Supp. at 659).

The Court further stated:

> Not every state action which has some adverse effect on minority persons is unconstitutional or in vio-

> lation of a statute. For example, it must be shown that the effect of the action under challenge falls more heavily on minority group members than on the population as a whole. Or it must be shown that the discriminatory effect results from a prior pattern or practice of discrimination. (362 F.Supp. at 657).

The single Judge made no findings of a prior pattern or practice of discrimination of the suburbs against racial minorities, or that the failure or refusal of the municipalities to sign cooperation agreements affected racial minorities in Cleveland any differently than other ethnic groups living in that inner city. The Judge has not pointed out any evidence of purposeful discrimination of each of the municipalities against racial minorities.

There was not a scintilla of evidence that any representative of CMHA or of the plaintiffs ever requested an appearance or appeared before the city councils of any of the defendant municipalities (the city councils being their governing bodies) to request that they or any of them approve a low-rent housing project or that they enter into a cooperation agreement.

The governing bodies of the five municipal defendants were never given an opportunity to pass upon the matter; nevertheless they were charged with discrimination against blacks for failure to take affirmative action.[4]

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4. There was evidence that the Director of CMHA had met with the Mayors of Euclid, Garfield Heights, and Westlake. These meetings were of an informational nature. No request was made for the municipalities to approve a housing project or to sign a cooperation agreement. The CMHA Director did not even meet on an informal basis with the Mayors of Parma and Solon. CMHA, before and after the filing of the suits, addressed informational letters to the Mayors and City Managers of all of the municipalities or villages, sometimes enclosing pamphlets relative to housing. The Mayors or Managers of the municipalities are not the "governing bodies" of the municipalities.

Plaintiffs' remedy, if they were dissatisfied with the decision of the three-Judge panel, was to appeal to the Supreme Court. That decision was binding on the single Judge and it could not be collaterally attacked.[5]

The judgment of the District Court is reversed and the cause is remanded for dismissal of the complaints.

EDWARDS, Circuit Judge, dissenting. This case is a civil rights case attacking the growing evil of apartheid in urban America. Plaintiffs are citizens of Cleveland, Ohio, who claim to represent the class of poor persons in need of housing in the Cleveland area, most of whom are black. They assert that the building of housing authorized by national law, 42 U.S.C. § 1401 *et seq.* (1970), for their benefit is being blocked by the named suburban cities because of a desire to exclude them and their class counterparts because of racial discrimination. The mechanism, allegedly discriminatorily employed by the defendant municipalities, is refusal to sign cooperation agreements between their cities and the Cuyahoga Metropolitan Housing Authority. The CMHA has jurisdiction over the entire area concerned (including defendant suburbs) and it desires to build low rent housing within defendant cities to relieve the area housing shortage.

The case was originally filed before a three-judge court to test the constitutionality of the statutory require-

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5. The first sentence in the dissent reads:

"This case is a civil rights case attacking the growing evil of apartheid in urban America."

Under our constitutional form of Government no such evil can ever exist in America.

We think, however, that the remedy for social change lies with Congress rather than with the courts. We have no discretion but to obey all valid laws enacted by Congress, and to follow all applicable decisions of the Supreme Court.

ment of cooperation agreements, 42 U.S.C. § 1415(7)(b)(i) (1970). After the submission of stipulations of fact, depositions, and the hearing of evidence, the three-judge court ruled that the cooperation agreement provision in the Housing Act was constitutional "on its face and as applied." The three-judge court, however, specifically declined to rule on Count II of plaintiffs' complaint which stated an action under 42 U.S.C. § 1983 (1970) against the five municipalities for allegedly refusing and failing to sign the cooperation agreements because of racial discrimination and referred Count II to the Chief Judge of the United States District Court for the Northern District of Ohio for disposition. (Count II of the complaint is printed in full, except for a portion directly applicable to the three-judge court decision, as Appendix A.)

Shortly after the three-judge court decision was announced, the Chief Judge of the District Court announced an opinion in the portion of the case which had been referred to him. In it he summarized his tentative views of the evidence which he had heard as part of the three-judge court. (*See Mahaley v. Cuyahoga Metropolitan Housing Authority*, 355 F. Supp. 1257 (N.D. Ohio 1973). The Chief Judge found racial segregation in both Cuyahoga County and in the City of Cleveland:

> "Cuyahoga County is a racially segregated county. The population of Cuyahoga County in 1970 was 1,721,300; 328,419 (19.1%) of whom were Negro. 87% of these 328,419 Negroes reside in Cleveland. Of the 40,578 who reside outside of Cleveland but within Cuyahoga County, 80% live in three eastern suburbs: 23,196 in the City of East Cleveland; 5,250 in Shaker Heights; and 4,007 in Warrensville Heights. In 1970 the defendant City of Garfield Heights had 1,789 Negro (4.6%) residents. All but two resided in one area

of Garfield Heights adjacent to the City of Cleveland. The other four defendant suburban cities' population in 1970 was from 99.1% to 99.8% Caucasian.

In Banks et al. v. Perk et al., 341 F. Supp. 1175 (N.D. Ohio 1972) the following findings of fact were made as to the City of Cleveland and are incorporated herein:

> 'The City of Cleveland is a racially divided city. Except for a small pocket of Negroes on the west side of the Cuyahoga River, in the Bellaire Section, almost all (96%) of the Negro citizens of the City live on the east side of the River. The Negro population of the City of Cleveland has grown dramatically since 1930 when Negroes constituted only 8% of the total population of the City. Today it is more than 38%. Since 1950 three neighborhoods on the east side of Cleveland, Hough, Glenville and LeeSeville, have changed from primarily White to almost entirely Negro. As a result, the schools in the City of Cleveland are quite badly segregated. Of the 183 public schools in the City, 85 are 90% to 100% Negro, and 72 are under 10% Negro. Approximately 95% of the Negro children attending public schools in the City attend schools which are all or substantially all Negro. In addition, in the last six years more than 5,000 jobs have moved from Cleveland's inner city to the outskirts of the City and to nearby suburbs. Access to these jobs has decreased for those who live in the inner city.' 314 F.Supp. at 1178." *Id.* at 1259-60.

The District Judge correctly summarized the question which the three-judge court had referred to him for determination:

"The question remaining before the court is whether the defendants have used the consent requirement as a tool to perpetuate segregation in violation of 42 U.S.C. § 1983." *Id.* at 1259.

Analyzing the evidence which had been submitted to the three-judge court, he held that a prima facie case of discrimination had been made out against the defendant suburbs and he ordered the Cuyahoga Metropolitan Housing Authority to draft a plan to alleviate the housing shortage and the pattern of segregation he had found with the five suburbs, their officers being ordered to file any objection thereto within 90 days thereafter.

It is these tentative findings and these orders to draft a plan which are sought to be appealed in this case.

The majority opinion in our court elects to treat the interlocutory orders of the District Court as final. It asserts that the three-judge court decided all the issues in this case and, hence, its decision controls decision in this case under the doctrine of res judicta. The majority also holds, as I understand the matter, that individual defendants whose action is needed to approve the cooperation agreements are absolutely immune from the relief sought in this § 1983 action, even though their acts may be violative of the federal constitution. The majority opinion also holds that plaintiffs have failed to prove their case and orders the District Judge to dismiss the complaint, although the appeal was taken before final hearings and final adjudication of the § 1983 issue had been completed.

I dissent.

First, it is clear that there has been no final order entered in this case. Nor has the District Court certified any controlling questions of law. *See* 28 U.S.C. § 1292(b) (1970). On that basis alone, we might well have been

better advised to dismiss this appeal. The doctrine of *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), of course, gives this court power to interpret the word "final" so as to accept an appeal where failure to do so would serve to deny justice. The facts in this case convince me that the interests of justice do not require us to accept this appeal. None of the suburban cities involved stand to lose any fundamental rights by the completion of this case before the District Court. They might yet prevail there entirely, and if they did not, they would have the clear right to appeal thereafter.

Second, the majority opinion holds that the three-judge court opinion and judgment in this case decided all of the issues, and, hence, rendered the present case subject to dismissal on grounds of res judicata. Quite clearly the three-judge court did not think that it was deciding all the issues in the case, for it specifically referred Count II stating the § 1983 case to the Chief Judge of the District Court. It is interesting to note that the opinion in the three-judge court case was written by Chief Judge Battisti. His interpretation of his own opinion is certainly contrary to any disposition on grounds of res judicata.

It appears to me that the contention that the three-judge court decision controls this case is answered by the explicit language of the opinion filed therein:

> "Having determined that 42 U.S.C. § 1415(7)(b) is constitutional both on its face and as applied, we find no further questions which are required to be heard by this three judge court. The question of whether the defendants' conduct violated the provisions of 42 U.S.C. § 1983 is not a proper matter for a three judge court. Therefore, without reaching any determination of the merits of Count Two of each complaint, this court remands consideration of these

claims to Chief Judge Frank J. Battisti. Metcalf v. Swank, 293 F.Supp. 268 (W.[sic] D.Ill.1968); see Perez v. Ledesma, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971)." *Mahaley v. Cuyahoga Metropolitan Housing Authority*, 355 F.Supp. 1245, 1250 (N.D. Ohio 1973).

It should be noted that the three-judge court did not, as the majority opinion asserts, decide that the conduct of the defendant municipalities was constitutional. That very question was referred to the Chief Judge of the District Court who made a tentative decision to the contrary.

Third, one of the most important questions in this case is whether or not injunctive relief may be obtained for violations of constitutionally established rights against the responsible officials of a city in their personal or official capacities. As I read the cases relied upon by the majority, all that they have thus far determined is that the municipalities themselves cannot be sued for damages or injunctive relief under § 1983. *City of Kenosha v. Bruno*, 412 U.S. 507 (1973); *Moor v. County of Alameda*, 411 U.S. 693 (1973); *Monroe v. Pape*, 365 U.S. 167 (1961). It is clear, however, that suits for injunctive relief (and damages) under § 1983 do indeed lie against municipal and county officials to restrain them from violating provisions of the federal constitution. *Egan v. City of Aurora*, 365 U.S. 514 (1961); *Myers v. Anderson*, 238 U.S. 368 (1915); *Tinker v. Des Moines Community School District*, 393 U.S. 503 (1969), and *Birnbaum v. Trussell*, 347 F.2d 86 (2d Cir. 1965). In this last case the Second Circuit said as follows:

"As we read the complaint it alleges that the defendants, under color of state law, deprived the plaintiff of his rights under the Fourteenth Amendment, in violation of Rev. Stat. § 1979 (1875), 42 U.S.C. § 1983 (1958), and conspired to deprive him of equal pro-

> tection of the laws in violation of Rev. Stat. § 1980(3) (1875), 42 U.S.C. § 1985(3) (1958). A showing that defendants acted 'within the scope of their employment and authority' is not sufficient to defeat the district court's jurisdiction. It would nullify the whole purpose of the civil rights statutes to permit all governmental officers to resort to the doctrine of official immunity. The statutory condition of defendant's acting 'under color' of state or territorial law contemplates that he act in an official capacity. To the extent that state or municipal officers, such as the defendants Trussell and Mangum, violate or conspire to violate constitutional and federal rights, the Civil Rights Laws, §§ 1979 and 1980(3), 42 U.S.C. §§ 1983 and 1985(3), abrogate the doctrine of official immunity. See The Doctrine of Official Immunity Under the Civil Rights Acts, 68 Harv.L.Rev. 1229 (1955)." *Birnbaum v. Trussell, supra* at 88-89 (Footnotes omitted.)

Other cases include *Hoffman v. Halden,* 268 F.2d 280 (9th Cir. 1959), and *Harkless v. Sweeney Independent School District,* 427 F.2d 319 (5th Cir.), *cert. denied,* 400 U.S. 991 (1970). Although the relief found to be available in this case was sought against the school superintendent and the individual trustees of the school district, the discussion is informative:

> "Turning then to the officials, the trustees and the superintendent, it seems well settled that § 1983 authorizes a suit against them. Federal judicial power has long been invoked to compel state officials to discharge their constitutional duties. See Board of Commissioners of Knox County v. Aspinwall, 1861, 65 U.S. (24 How.) 376, 16 L.Ed. 735; Home Telephone & Telegraph Co. v. Los Angeles, 1913, 227 U.S. 278, 33 S.Ct. 312, 57 L.Ed. 510.

In numerous cases since Monroe v. Pape, the Supreme Court has permitted relief under § 1983 against state officials sued as such, without mention of that case. Griffin v. County School Board of Prince Edward County, 1964, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (county board of supervisors), and see other cases which are the progeny of Brown v. Board of Education, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, such as Alexander v. Holmes County Board of Education, 1969, 396 U.S. 19, 90 S.Ct. 29, 24 L.Ed.2d 19, and Carter v. West Feliciana Parish School Board, 1970, 396 U.S. 290, 90 S.Ct. 608, 24 L.Ed.2d 477. See also Rinaldi v. Yeager, 1966, 384 U.S. 305, 86 S.Ct. 1497, 16 L.Ed.2d 577 (state prison warden); Davis v. Mann, 1964, 377 U.S. 678, 84 S.Ct. 1453, 12 L.Ed.2d 609 (state election officials); WMCA v. Lomenzo, 1964, 377 U.S. 633, 84 S.Ct. 1418, 12 L.Ed.2d 568 (state election officials); Reynolds v. Sims, 1964, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (state election officials); Wesberry v. Sanders, 1964, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (governor and secretary of state); Baker v. Carr, 1962, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (state election officials)." *Harkless v. Sweeney Independent School District, supra,* at 323.

The majority opinion in this case does not deny that suits against municipal officials for constitutional violations are permissible under § 1983.

The majority contends, however, that the councilmen of the affected municipalities are immune from judicial orders because of the doctrine of separation of the powers of government. Justice Stewart, then a member of our court, in *Nelson v. Knox,* 256 F.2d 312 (6th Cir. 1958), made these observations on municipal legislative immunity:

"We hold at the outset that the extent of the defendants' insulation from liability under the Civil Rights Act cannot properly be determined by reference to the local rule in Michigan. Surely each state cannot be left to decide for itself which of its officials are completely immune from liability for depriving a citizen of rights granted by the Federal Constitution. The question must be decided as a matter of general law.

In the light of the relevant federal decisions, we cannot agree that members of a municipal legislative body share the complete immunity from liability which is enjoyed by judges and state legislators. In Hague v. C.I.O., 1939, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423, the Supreme Court affirmed as modified a decree of injunction against the members of the Board of Commissioners of Jersey City, New Jersey, in an action brought under the Civil Rights Act. Nowhere in the five opinions filed in the Hague case does it appear that any of the seven Justices who participated were of the view that municipal legislative officials are clothed with such complete immunity." *Nelson v. Knox, supra,* at 314. (Footnote omitted.)

The Supreme Court has recently dealt with the absolute immunity claims of the highest official of a state and rejected such immunity. In *Scheuer v. Rhodes,* 42 U.S.L.W. 4543 (U.S. April 17, 1974), the Supreme Court said:

"The District Court acted before an answer was filed and without any evidence other than the copies of the proclamations issued by Respondent Rhodes and brief affidavits of the Adjutant General and his assistant. In dismissing the complaints, the District Court and the Court of Appeals erroneously accepted as a fact the good faith of the Governor, and took judicial no-

tice that 'mob rule existed at Kent State University.' There was no opportunity afforded petitioners to contest the facts assumed in that conclusion. There was no evidence before the Court from which such a finding of good faith could be properly made and, in the circumstances of these cases, such a dispositive conclusion could not be judicially noticed. We can readily grant that a declaration of emergency by the chief executive of a State is entitled to great weight but it is not conclusive. *Sterling v. Constantin, supra* [287 U.S. 378 (1932).]

The documents properly before the District Court at this early pleading stage specifically placed in issue whether the Governor and his subordinate officers were acting within the scope of their duties under the Constitution and laws of Ohio; whether they acted within the range of discretion permitted the holders of such office under Ohio law and whether they acted in good faith both in proclaiming an emergency and as to the actions taken to cope with the emergency so declared. Similarly, the complaint places directly in issue whether the lesser officers and enlisted personnel of the Guard acted in good faith obedience to the orders of their superiors. Further proceedings, either by way of summary judgment or by trial on the merits, are required. The complaining parties are entitled to be heard more fully than is possible on a motion to dismiss a complaint." *Scheuer v. Rhodes, supra,* at 4548-49.

There is no question but that municipal councilmen may assert a qualified immunity from suit when acting within the scope of their legislative duties. *See Tenney v. Brandhove,* 341 U.S. 367, 376 (1951); *Nelson v. Knox,* 256 F.2d 312 (6th Cir. 1958); *Lynch v. Johnson,* 420 F.2d 818

(6th Cir. 1970). Of course, the scope of legislative duties cannot include acts which violate the federal constitution.

In my opinion we cannot and should not pass on any claims of qualified immunity until the charges of racial discrimination have been finally heard and decided.

Fourth, the majority opinion asserts that plaintiffs have failed to prove their claims. The trial judge, however, who has heard the evidence thus far submitted, has found the facts in some detail and has held that plaintiffs have proved a prima facie case. The majority does not assert that any of the facts found are "clearly erroneous." Rather, it seems to assume them as true and to assert as a matter of law that even if plaintiffs should prove that the defendant councilmen's sole reason for refusing to sign the cooperation agreements was a desire to exclude Negroes from living in their cities, that they had the right to do so.

This cannot be the law if this nation respects its Constitution.

James v. Valtierra, 402 U.S. 137 (1971), upon which the majority relies, upheld a referendum provision applicable to low rent housing in the Constitution of the State of California because it was racially neutral on its face.

The three-judge court in this case upheld the constitutionality of the local cooperation agreement of the federal housing act on the same ground. But neither the three-judge court nor the Supreme Court in *Valtierra* held that city officials could employ the racially neutral language of the cooperation agreement provision in order to exclude citizens of a different race from residing in their cities.

It may well be that plaintiffs, if afforded the complete adjudicatory process in the District Court, will not be able to prove that defendants' actions or inactions are based on

constitutionally impermissible grounds. But this record does not suggest that they should be denied their right to complete their case.

The appeal should be dismissed as premature. If not, then the District Judge's orders should be affirmed and the case should be remanded to the District Court for further proceedings.

APPENDIX A

SECOND COUNT

25. This is an action for declaratory judgment authorized under Section 2201 of Title 28 of United States Code to enforce rights secured by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution by the Thirteenth Amendment to the United States Constitution, and by the Supremacy Clause of Article VI of the United States Constitution.

This is also an action under Section 1983 of Title 42 of the United States Code to redress the deprivation of rights, privileges and immunities secured by the Constitution of the United States and by the United States Housing Act of 1937, as amended, 42 U.S.C. Sections 1401 et seq.; the Civil Rights Act of 1964, 42 U.S.C. Section 2000 d; Section 1981 of Title 42 of the United States Code; Section 1982 of Title 42 of the United States Code; the Civil Rights Act of 1968, 42 U.S.C. Sections 3601 et seq.; and the Housing and Urban Development Act of 1968, 12 U.S.C. Sections 1701 et seq.

Jurisdiction is also conferred by Sections 1343 (3), 1343 (4) and 1331 (a) of Title 28 of the United States Code. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

• • •

26. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 24, inclusive, of the First Count of this Complaint as if fully set forth herein.

27. The territorial jurisdiction of defendant CMHA includes the City of Cleveland and 54 other cities and villages, including each of defendant Cities. About 20% of the persons in the jurisdictional area of defendant CMHA are Negro. About 87% of such Negro population lives in the City of Cleveland.

28. The greater Cleveland area presents the typical American urban community situation, where the great majority of Negro and other minority group residents are confined to certain parts of the central city. The white middle class has migrated to the suburbs leaving the central city to those of lower economic means, for the most part members of minority groups, who are unable to afford suburban housing.

29. Employment opportunities for lower and moderate income persons have increased in the suburban communities of the greater Cleveland area, including each of defendant Cities, and have decreased in the City of Cleveland where the majority of Negroes and other minority groups are confined.

30. There are presently about 4,200 families on the waiting list of defendant CMHA who are qualified for low rent housing. These include families displaced from former housing by reason of governmental action, families subject to disability, veterans or families of persons in the armed services of the United States, and elderly persons. Most of the 4,200 families on the waiting list of defendant CMHA are Negro and other minorities. The present waiting time for families applying to defendant CMHA for low

rent housing is from two to four years. There are many more persons within the territorial jurisdiction of defendant CMHA who are eligible for low rent housing but are not on the waiting list of defendant CMHA.

31. Over the past several years many units of housing in the greater Cleveland area have been demolished by action of public agencies resulting in the displacement of low income persons from their homes. Most of the persons so displaced have been Negroes.

32. Under present plans, over the next several years additional units of housing in the great Cleveland area will be demolished by action of governmental agencies resulting in the displacement of additional low income families from their homes. Many of the persons displaced will be Negroes.

33. There is not an adequate supply of decent, safe and sanitary housing in the territorial jurisdiction of CMHA to rehouse persons who have been displaced or will be displaced by public action.

34. There are low income persons residing in each of defendant Cities who are eligible for low rent housing.

35. Defendant CMHA entered into cooperation agreements as required under the Housing Act of 1937, as amended, 42 U.S.C. Section 1415 (7) (b), with the City of Cleveland in 1937, 1941 and 1949 under which it was authorized to build a total of 12,000 housing units, 11,998 of which are either built, under construction or committed. In 1969 defendant CMHA entered into a cooperation agreement with the City of East Cleveland authorizing the construction of 205 units in that municipality. Defendant CMHA has not entered into cooperation agreements with any other municipality.

36. On information and belief plaintiffs state that defendant CMHA has attempted to enter into cooperation agreements with each of defendant Cities, but that the governing bodies of the defendant Cities have declined to enter into cooperation agreements with defendant CMHA.

37. The failure of defendant CMHA to enter into cooperation agreements with defendant Cities or other municipalities within its territorial jurisdiction has limited low rent housing to the Cities of Cleveland and East Cleveland. This limitation discriminates against low income persons by virtue of their class and against Negro persons because of their race.

38. The confinement of persons eligible to reside in low rent housing in areas which are predominately Negro and predominately low income has resulted in unequal access by low income families to employment opportunities, health care, educational facilities and governmental services, to their physical and psychological detriment.

39. The cooperation agreement requirement of the Housing Act of 1937, as amended, 42 U.S.C. Section 1415 (7) (b), as it has been used within the territorial jurisdiction of defendant CMHA, by defendant CMHA, by each defendant City and by other municipalities:

(a) denies plaintiffs and members of the classes they represent the equal protection of federal laws designed to provide safe, sanitary and decent housing to them within the territorial jurisdiction of defendant CMHA at rents which they can afford and of federal laws designed to provide them access to housing within the territorial jurisdiction of defendant CMHA without regard to their race or class;

(b) denies plaintiffs and member of the classes they represent of choices as to the location of their housing within the territorial jurisdiction of defendant CMHA;

(c) deprives plaintiffs and members of the classes they represent of equal access to employment opportunities, health care, educational facilities and governmental services within the territorial jurisdiction of defendant CMHA;

(d) continues a policy and practice of discrimination and segregation on the basis of race and class in low rent housing within the territorial jurisdiction of defendant CMHA;

(e) intensifies the segregation of low rent housing within the territorial jurisdiction of defendant CMHA along class and race lines;

(f) constitutes a deprivation of the life, liberty and property of the plaintiffs and members of the classes they represent in violation of the due process clause of the Fourteenth Amendment to the United States Constitution;

(g) denies the plaintiffs and members of the classes they represent the equal protection of the law in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution;

(h) constitutes a means whereby the badges and vestiges of slavery are inflicted upon the plaintiffs and members of the classes they represent in violation of the Thirteenth Amendment to the United States Constitution;

(i) denies the plaintiffs and members of the classes they represent the full and equal benefit of laws in violation of Section 1981 of Title 42 of the United States Code;

(j) denies the plaintiffs and members of the classes they represent the rights of citizens to purchase, lease and hold real property in violation of Section 1982 of Title 42 of the United States Code; and

(k) is contrary to the laws and Constitution of the United States and in violation of the Supremacy Clause of Article VI of the United States Constitution.

40. Plaintiffs and members of the classes they represent are irreparably injured by the operation of the cooperation agreement requirement of the Housing Act of 1937, as amended, 42 U.S.C. Section 1415 (7) (b), as it has been used within the territorial jurisdiction of defendant CMHA, and such irreparable injury will continue until such cooperation agreement requirement shall have been declared invalid and of no further force and effect as applied to plaintiffs and defendant CMHA and defendant Cities. Plaintiffs and members of the classes they represent have no adequate remedy at law.

JUDGMENT ENTRY OF THE COURT OF APPEALS

(Filed July 9, 1974)

No. 73-1407

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ARTIE MAHALEY, *et al.*,
Plaintiffs-Appellees,

vs.

CUYAHOGA METROPOLITAN HOUSING AUTHORITY, *et al.*,
Defendants-Appellees,

and

CITY OF EUCLID, *et al.*,
Defendants-Appellants.

JUDGMENT

Before: WEICK, EDWARDS and PECK, Circuit Judges.

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case is remanded for dismissal of the complaints.

It is further ordered that Appellants recover from Appellees, the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

ORDER OF THE COURT OF APPEALS DENYING PETITION FOR REHEARING

(Filed August 14, 1974)

No. 73-1407

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTIE MAHALEY, *et al.*,
Plaintiffs-Appellees,

vs.

CUYAHOGA METROPOLITAN HOUSING AUTHORITY, *et al.*,
Defendants-Appellees,

and

CITY OF EUCLID, *et al.*,
Defendants-Appellants.

ORDER

Before WEICK, EDWARDS and PECK, Circuit Judges.

No Judge having requested that a vote be taken on the petition for a rehearing en banc, the petition for rehearing was considered by the panel.

It is ORDERED that said petition be and it is hereby denied.

Judge Edwards would grant the rehearing for the reasons stated in his dissenting opinion.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN P. HEHMAN
Clerk

MEMORANDUM OPINION AND ORDER OF THREE JUDGE DISTRICT COURT

(Filed February 22, 1973)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action C 71-251

ARTIE MAHALEY, *et al.*,
Plaintiffs,

v.

CUYAHOGA METROPOLITAN HOUSING AUTHORITY, *et al.*,
Defendants.

Civil Action C 72-67

DOROTHY M. HARRISON, *et al.*,
Plaintiffs,

v.

CUYAHOGA METROPOLITAN HOUSING AUTHORITY, *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

Before: CELEBREZZE, Circuit Judge; BATTISTI, Chief Judge; and LAMBROS, District Judge.

BATTISTI, C.J., delivered the opinion of the Court in which CELEBREZZE, Circuit Judge, joined. LAMBROS, J., filed a dissenting opinion.

BATTISTI, C.J.:

These are consolidated suits instituted pursuant to 42 U.S.C. §1981 and §1983 and arising under federal law invoking this court's jurisdiction pursuant to 28 U.S.C. §§1343(3), 1343(4) and 1331(a). They are brought in behalf of all tenants and applicants for low-income housing, the vast majority of whom are Negro, and the Path Association, a non-profit corporation incorporated under the laws of the State of Ohio whose principal purpose is to stimulate the improvement of housing and related neighborhood conditions in the Greater Cleveland Metropolitan Area. The defendants are the Cuyahoga Metropolitan Housing Authority, which is a public corporation created under Section 3735.27 et seq. of the Ohio Revised Code and is authorized, inter alia, to engage in the development and administration of low rent housing in all areas of Cuyahoga County, except Chagrin Falls Township. Defendant Fitzgerald is the Director of defendant Cuyahoga Metropolitan Housing Authority. The members of the Board of CMHA are parties defendant in their official capacities. The defendant suburban cities in C 71-251, Euclid, Garfield Heights, Parma, Solon and Westlake (suburbs) are all municipal corporations within Cuyahoga County, established under the laws of the State of Ohio; all but Parma are chartered. The respective Mayors and Councilmen of the defendant suburbs are also parties defendant. The defendants in C 72-67 are the City of Cleveland, its Mayor, and its Councilmen. The defendant Department of Housing and Urban Development of the United States (HUD) is created under the laws of the United States and administers the federal low rent public housing laws. Defendant Romney is the Secretary of HUD and its chief executive official.

The plaintiffs are seeking a declaration that 42 U.S.C. §1415(7)(b)(i) is unconstitutional on its face or as it has been applied. The named plaintiffs in C 71-251 are two Negroes and one White citizen of the United States who require low rent public housing for their health, safety and welfare. They represent a class of low-income residents of the Greater Cleveland Area, who by virtue of their poverty, or race, or both, are unable to secure decent, safe and sanitary housing at rents they can afford without the assistance of CMHA. The plaintiffs contend that the local consent requirement of 42 U.S.C. §1415(7)(b)(i) permits and encourages the governing bodies of local municipalities to control the acceptance of low rent housing and has directly led to the containment of low rent housing into areas, almost entirely within the City of Cleveland, which are predominately Negro, in violation of the Fifth, Thirteenth and Fourteenth Amendments to the United States Constitution. In Count Two of C 71-251 the plaintiffs contend that the defendant suburban cities have declined to enter into Cooperation Agreements with CMHA in an attempt to perpetuate discrimination in housing patterns, which would concentrate Negroes largely within the City of Cleveland.

The named plaintiffs in C 72-67 are Negro tenants or applicants for CMHA public housing. Counts One and Two are substantially identical to their counter parts in C 71-251. Count Three of this complaint alleges that the number of units agreed to in the Cooperation Agreement of 1971 between the City of Cleveland and CMHA is inadequate to meet the needs for low income housing in Cleveland. Therefore, the plaintiffs pray that judgment be entered declaring that the failure of defendant councilmen to execute a "meaningful" Cooperation Agreement is in conflict with the plaintiffs' rights secured by the Four-

teenth and Thirteenth Amendments, and that this court issue an order directing that CMHA and the City of Cleveland enter into a new Cooperation Agreement which more properly reflects low income housing needs.

42 U.S.C. §1415(7)(b) provides:

> "The Authority shall not make any contract for loans (other than preliminary loans) or for annual contributions pursuant to this chapter with respect to any low-rent housing project initiated after March 1, 1949
>
> (i) unless the governing body of the locality involved has entered into an agreement with the public housing agency providing for the local cooperation required by the Authority pursuant to this chapter."

The Department of Housing and Urban Development upon the application of a local public housing agency may provide federal assistance for the acquisition or construction of low rent housing designed to meet unsatisfied housing needs. 42 U.S.C. §1401 provides, in pertinent part:

> "It is declared to be the policy of the United States to promote the general welfare of the Nation by employing its funds and credit, as provided in this chapter, to assist the several States and their political subdivisions to alleviate present and recurring unemployment and to remedy the unsafe and insanitary housing conditions and the acute shortage of decent, safe and sanitary dwellings for families of low income . . . that are injurious to the health, safety and morals of the citizens of the Nation."

Specifically, the Secretary of HUD is authorized to make loans "to public housing agencies to assist the development, acquisition, or the administration of low-rent housing."

42 U.S.C. §1409. The Secretary may also make annual contribution contracts with local public housing agencies to ensure the low-rent character of housing projects which are federally assisted. 42 U.S.C. §1410(a). While preliminary loans are designed, in effect, to permit the local public housing agency to develop and initiate plans of acquisition for low-rent housing, annual contributions are intended to assist the agency in amortizing its bond indebtedness, which may be incurred in the actual costs of construction and land acquisition. 42 U.S.C. §§1409, 1410.

The low rent housing program is based upon the determination of local agencies, as demonstrated to HUD, that there exists a need for low-rent housing in the locality concerned "not being adequately met by private enterprise". 42 U.S.C. §1415(7)(a). The responsibility for this assessment rests jointly with the local community and the local housing authority. If applicable federal requirements are satisfied, the Department of HUD may upon the application of the local public housing agency provide federal assistance by means of loans and annual contributions.

In its enactment of the United States Housing Act of 1949, 42 U.S.C. §§1401 *et seq.*, the Congress expressly conditioned the provision of federal assistance either by preliminary loan or annual contributions upon the local public housing agency having entered into a local Cooperation Agreement with the governing body of the locality in which low-rent housing was to be acquired or constructed. 42 U.S.C. §§1415(7)(a), (b). The local Cooperation Agreement ensures that the low-rent character of federally assisted housing will be exempt from otherwise applicable State and local taxes (42 U.S.C. §1401(h)), and that the provision of additional dwelling units under the program will result in corresponding elimination or improvement of unsafe or insanitary dwelling units situated in the locality. 42 U.S.C. §1410(a).

The plaintiffs contend that the requirement of 42 U.S.C. §1415(7)(b)(i) is unconstitutional both on its face and as it has been applied by the suburban defendants and the City of Cleveland. These will be examined seriatim.

The plaintiffs contend that the Cooperation Agreement requirement of local consent on its face violates the due process clause of the Fifth Amendment to the United States Constitution.[1]

It is clear that not all statutory classifications are violative of equal protection as guaranteed by either the Fifth or Fourteenth Amendments. In 1970 in *Dandridge v. Williams*, 397 U.S. 471, 485 (1970), the Supreme Court stated:

> "In the area of economics and social welfare, the State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality'. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 . . . 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan v. Maryland*, 366 U.S. 420, 426."

The argument which assumes that the constitutional guarantee of equal protection is not violated merely because a statute authorizes one citizen to be treated differently than others, is of course, subject to the qualification that the statute does not establish an invidious discrimination. In addition the argument does not reach the question of whether an otherwise constitutional enactment is being applied in an unconstitutional manner.

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1. The plaintiffs' arguments based on freedom of movement and unlawful delegation are rejected.

Equal protection, absent an invidious discrimination, *requires only that a Congressional* enactment have some reasonable relation to a statutory objective or purpose. This statute is certainly not arbitrary, or capricious and has a rational basis. This consent requirement was provided to ensure that low-rent housing would be coupled with the slum clearance provisions of the Act, and to buttress the notion of cooperative federalism.

The plaintiffs have not shown that the requirement of 42 U.S.C. §1415(7)(b)(i) is based on a suspect category or affects fundamental rights. On its face this requirement does not discriminate on the basis of race. Moreover, it does not establish an invidious discrimination based upon wealth. While it is true that local consent is required only under the federal housing program for the poor, this does not, ipso facto, establish an invidious discrimination. Under some circumstances legislative enactments which have discriminated on the basis of wealth have been struck down. *Edwards v. California*, 314 U.S. 160 (1941) invalidated a state law which made it a crime for an individual to assist an indigent in entering the State. The criminal law has eradicated those enactments which denied appellate review solely on the grounds of the defendant's inability to afford a transcript, *Griffin v. Illinois*, 351 U.S. 12 (1956), and a state law which left to the discretion of the appellate court whether indigents would be provided counsel on appeal. *Douglas v. California*, 372 U.S. 353 (1963). Other cases which have held that wealth has constituted a suspect classification include *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (Poll tax) and *Boddie v. Connecticut*, 401 U.S. 371 (1971) (Prepayment of costs in divorce actions).

These cases, however, must be read in light of *James v. Valtierra*, 402 U.S. 137 (1971). The plaintiffs, who were

eligible for low cost public housing, challenged the requirement of Article XXXIV of the California Constitution, which provided that no public housing project could be developed, constructed or acquired by any State public body, until approved by a majority of voters in the locality in which the proposed development was to be located. The Supreme Court found that Article XXXIV did not, on its face, involve the suspect category of race, since it applied to all low rent public housing projects, and that since it was supported by a rational basis, the provision was sustained. The court held that the evidence before it did not support the claim that while the law was seemingly neutral on its face, it in fact was aimed at a racial minority. While emphasizing and recognizing the California tradition of housing referenda which provide ". . . citizens a voice on questions of public policy." 402 U.S. at 141, the opinion of the court does seem to indicate that wealth, per se, is not a suspect classification in the context of the constitutional examination of a provision relating to housing assistance or welfare. See *Jefferson v. Hackney*, ... U.S. ..... (1972); *English v. Town of Huntington*, 448 F.2d 319 (2d Cir. 1971); Cf. *Chidsey v. Gueria*, 443 F.2d 584 (6th Cir. 1971).

The plaintiffs contend that their fundamental rights have been violated. They do not contend that there is a right to safe and sanitary housing, *Lindsey v. Normet*, 405 U.S. 56 (1972), but rather that there is a fundamental right to housing outside the inner city. Those interests which have been characterized as fundamental are quite few. To date the right asserted here has not been elevated to the level of a fundamental right. However, simply categorizing housing as a basic human need is not sufficient to call for application of strict judicial review outside of the carefully designed parameters which the Supreme Court has set for fundamental rights.

In spite of this it can not be denied that only the federal housing subsidies, which are directed at low income people, require any kind of local consent. The direct result of this is that whenever a suburban city refuses to sign a Cooperation Agreement, the bulk of poor persons residing in a nearby urban center will be effectively excluded from residence in that suburb. While it is true that if the federal low rent housing law specifically provided that Negroes could not live in White neighborhoods, there would be no question as to the unconstitutionality of such an enactment, *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Shelley v. Kramer*, 334 U.S. 1 (1948), that case is not before the Court. The result of Section 1415(7)(b)(i) is not necessarily racial discrimination. The racial effect of this statute, if any, is not caused by the statute itself but rather by municipal action or inaction which may have used this provision as a shield to protect its inhabitants from integration by low income Negroes.

The argument which the plaintiffs have presented assumes that merely because low income Negroes do not live in the defendant suburban cities, the statute has established suspect classifications which have caused this result. The plaintiffs have not shown such a cause and effect relationship. It is true that recent Civil Rights Acts have insisted that no person should be denied the benefits of any federally assisted program on the basis of race, color or national origin. 42 U.S.C. §2000(d) (1964). The Civil Rights Act of 1968, 42 U.S.C. §3601, established a national policy against discrimination in the sale or rental of housing. As a result of these enactments, HUD has been charged with the responsibility of guaranteeing that projects assisted by it do not foster racial segregation. *Hicks v. Weaver*, 302 F.Supp. 619 (E.D.La. 1969); *Shannon v. HUD*, 436 F.2d 809 (3rd Cir. 1970). This national policy of integration in housing patterns is not *necessarily* inconsistent with state

cooperation. While the requirement of local cooperation may be at least partially inconsistent with the new policy of HUD, that does not, per se, establish a suspect classification on either racial or economic ground. Therefore, it seems that this law is neutral on its face. However, it may have been manipulated improperly.

Having determined that 42 U.S.C. §1415(7)(b) is constitutional both on its face and as applied, we find no further questions which are required to be heard by this three judge court. The question of whether the defendants' conduct violated the provisions of 42 U.S.C. §1983 is not a proper matter for a three judge court. Therefore, without reaching any determination of the merits of Count Two of each complaint, this court remands consideration of those claims to Chief Judge Frank J. Battisti. *Metcalf v. Swank*, 293 F.Supp. 268 (W.D.Ill. 1968); See *Perez v. Ledesma*, 401 U.S. 82 (1971).

Therefore summary judgment shall enter for the defendants on Count One of each complaint. The three judge panel is dissolved and the remainder of these consolidated cases are remanded to the judge to whom the case was originally assigned, Chief Judge Frank J. Battisti.

IT IS SO ORDERED.

/s/ ANTHONY J. CELEBREZZE
Circuit Judge

/s/ FRANK J. BATTISTI
Chief Judge

LAMBROS, DISTRICT JUDGE, DISSENTING.

I dissent from the decision to remand this case to Chief Judge Battisti for his ruling as a single judge on the claim of racial discrimination and from the decision that the

Local Cooperation Agreement requirement in 42 U.S.C. §1415(7)(b)(i) is constitutional.

The dissolution of the three-judge court is not justifiable either from the point of view of judicial economy or the orderly disposition of this case. The three-judge court has already heard the evidence relating both to the claim that the statute is unconstitutional and the claim that defendants discriminated. Therefore, the dissolution of the three-judge court after the ruling on the constitutionality of the statute and prior to ruling on the claim of racial discrimination does not result in a timesavings. See *Perez v. Ledesma*, 401 U.S. 82, 90 (Stewart concurring); *Florida Lime and Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73, 84, 85 (1960). Moreover, this case could have been decided in a more orderly fashion without dissolution. The practice of avoiding rulings on the constitutionality of a federal statute where relief can reasonably be granted without reaching that question is one consistently sanctioned by the Supreme Court. *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971); *Crowell v. Benson*, 285 U.S. 22, 62 (1932). In this case, it is possible that the relief requested could be granted upon a finding of discrimination without reaching the question of the constitutionality of the statute. However, this orderly disposition was precluded by the decision to rule on the constitutionality of the statute first and then remand the remainder.

In dissenting from the dissolution of the three-judge court, I will present my findings concerning the claim of discrimination because I think this may be the only question which the three-judge court should have reached. However, since the Court has ruled that the Local Cooperation Agreement requirement is constitutional, I will also comment on the inadvisability of broadening the doctrine of *James v. Valtierra*, 402 U.S. 137 (1971), to uphold that statute.

I. INVIDIOUS DISCRIMINATION BY SUBURBS*

A. The Test

Under the equal protection clause of the Fourteenth Amendment to the Constitution and the Civil Rights Acts, state and municipal officials are prohibited from acting with the intent of perpetuating patterns of racial discrimination in housing. *Reitman v. Mulkey*, 387 U.S. 369, 380, 381 (1967); 42 U.S.C. §1983. Since the officials seldom admit publicly that their acts are racially motivated, the courts have developed methods to test certain acts or refusals to act in order to determine whether discriminatory intent exists.

In particular the courts have examined, first, whether the act has a racially discriminatory effect and, second, whether there is legitimate nonracial explanation for the act. In *Hunter v. Erickson*, 393 U.S. 385 (1969), for example, the Court emphasized the need to examine the potential impact of an ordinance which mentioned race but appeared to be neutral rather than discriminatory on its face and for which there was no general legislative purpose. At least five circuits have adopted the principle that, even though an act is seemingly neutral on its face and does not mention race, if it results in housing discrimination and if the officials fail to give a reasonable nonracial reason for it, the act constitutes invidious discrimination in violation of the Fourteenth Amendment. *Dailey v. City of Lawton*, 296 F.Supp. 266 (W.D. Okla. 1969), *aff'd* 425 F.2d 1037, 1039, 1049 (10th Cir. 1970); *Crow v. Brown*, 332 F.Supp. 382 (N.D. Ga. 1971), *aff'd* 457 F.2d 788 (5th Cir. 1972); *Kennedy Park Homes Association v. City of Lackawanna*, 318 F.Supp. 669 (W.D. N.Y.), *aff'd* 436 F.2d 108 (2d Cir.

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* I find no basis upon which to order relief and therefore would dismiss the case as to defendant City of Cleveland.

1970), *cert. denied*, 401 U.S. 1010 (1971); *Hawkins v. Town of Shaw, Mississippi*, 437 F.2d 1286 (5th Cir. 1971); *Banks v. Perk*, 341 F.Supp. 1075 (N.D. Ohio 1972), *aff'd* ..... F.2d ..... (6th Cir. 1973); *Southern Alameda Spanish Speaking Organization v. City of Union City, California*, 424 F.2d 291, 295-296 (9th Cir. 1970); *Gautreaux v. Chicago Housing Authority*, 342 F.Supp. 827, 829 (N.D. Ill. 1972). The importance of this doctrine is aptly demonstrated by the situation here presented.

B. Action or Inaction

The defendant suburbs urge the Court to characterize their refusal to negotiate the Local Cooperation Agreement, which is a prerequisite to federal funding for low income housing under 42 U.S.C. §1415(7)(b)(i), as mere inaction which it claims could not be discriminatory. However, it is unnecessary to rule on the question of whether municipal inaction can be reached under the Fourteenth Amendment because the refusal in this case clearly constitutes affirmative action. *See Hawkins v. Town of Shaw, Mississippi*, 461 F.2d 1171, 1173 (5th Cir. 1972).

The action required of the defendant suburbs was not actual spending and construction, as would be the case, for example, in the failure to build a school. All that was needed was the approval for the plans made by defendant CMHA and financed by the federal government. Furthermore, the defendant suburbs were pressed on numerous occasions for their decision in this regard. That they viewed their withholding of the Local Cooperation Agreement and negotiations related thereto as affirmative action is evident by remarks by officials in defendant Parma. There, both the Mayor and President of Council spoke of the need to exclude public housing and, in the case of the President of City Council, to keep blacks from moving into the suburb by way of public housing.

In other words, the refusals of defendant suburbs to negotiate a Local Cooperation Agreement were not within the analogy of one who walks past a drowning person but were more akin to the analogy of one who holds a life preserver over a drowning person and, upon consideration, decides not to drop it. *See* C. Black, *State Action, Equal Protection and California's Proposition 14*, 81 Harv. L.Rev. 69, 73 (1967). The defendant suburbs who could have effortlessly permitted the development of low income public housing but preferred to prevent it must be said to have acted affirmatively. *See Loving v. Virginia*, 388 U.S. 1 (1967).

C. Racial Discrimination

A brief examination of existing housing patterns and the racial characteristics of plaintiffs and defendant suburbs demonstrates the discriminatory effect of the defendant suburbs' refusals to negotiate. Cuyahoga County is segregated racially, with ninety-seven per cent of its black population residing in four municipalities. The defendant suburbs are examples of the more than fifty municipalities predominately populated by whites which surround the black population. Four of the defendant suburbs are 99.1 to 99.8 per cent white, with the fifth suburb being 95.5 percent white.[1]

Plaintiffs, who are seeking to live in defendant suburbs, are predominately black. In 1971, 86 per cent of the applicants for family units were black and 73 per cent of applicants for both elderly and family units were black. The defendant suburbs' refusals to negotiate a Local Cooperation Agreement thus have had the effect of pre-

1. Garfield Heights is 95.4 per cent white. However, all but two of its black residents live in an area adjacent to the City of Cleveland. These figures are based on the 1970 census.

venting integration of the defendant suburbs through the location of public housing in these suburbs.

Defendant suburbs should have, in light of existing housing segregation and the fact that plaintiffs are predominately black, realized that their refusals would have a racially discriminatory effect. However, they did not advance an explanation for such refusals but merely claimed that the refusals were not solely racially motivated.

In contrast, the plaintiffs did not rest their case on the racially discriminatory effect of the refusal and the lack of explanation. They further showed that there was not a plausible nonracial reason for defendant suburbs' refusals. In particular, they showed that a need for low income public housing existed and that it was not reasonable to assume, without negotiation, that the construction of low income public housing would result in a loss in revenues to the suburban community permitting it.

1. *Need.* The need for housing must, under a 1968 Executive Order for racially scattered site housing, be determined on a metropolitan basis. 24 C.F.R. Ch. II. Part 200N. Using the scattered site definition of need, the Cleveland City Planning Commission fixed a need for the County and listed the number of units, varying between 158 and 2105, needed within each of the defendant suburbs. That testimony was substantiated by the fact that approximately 5600 qualified persons are presently on the waiting list for low income public housing and that many of these persons prefer suburban locations.

Assuming for purposes of argument, however, that need must be determined within each suburb, the plaintiffs still were able to show that the need existed. They presented expert testimony to the effect that numerous wel-

fare recipients already living within each suburb were unable to afford adequate housing.

2. *Loss or Gain in Revenues.* Under both state and federal statutes, low income public housing is exempt from state and local taxes. 42 U.S.C. §1410(h); Ohio Rev. Code §3735.34. In lieu of taxes, the housing project pays 10 per cent of its shelter rents to the taxing authority. *Id.* The public housing projects must, under federal statute, pay the municipality for all services at the same rate as private housing projects. 42 U.S.C. §1410(i).

The tax loss or gain to the municipality as the result of low income public housing located there will therefore depend on the difference between 10 per cent of the shelter rents and the taxes which would have resulted from an alternative use of the land in question. When, without the public housing, the land would be undeveloped, would be used for a church, street or other tax exempt function, or would be less effectively developed, the municipality would gain revenue as the result of a low income development. Thus, for example, the CMHA developed properties in Cleveland yielded higher revenues after their development than had those properties prior to development.

Because the loss or gain is dependent on so many variables, it is not possible to determine whether a net loss would result without first negotiating with regard to specific parcels of land and specific kinds of housing projects. Thus, the prospect of loss of revenue in this case could not have motivated the defendant suburbs to refuse to negotiate toward the signing of a Local Cooperation Agreement.

The defendant suburbs have not admitted that their refusals to negotiate are racially motivated. However, the situation presented is a clear case of housing discrim-

ination. While there are a few white prospective tenants and a fraction of a percentage of blacks within defendant suburbs, the situation is significantly one of white versus black. The defendant suburbs have repeatedly refused not only to sign a Local Cooperation Agreement but even to negotiate with defendant CMHA. They have not only failed to state compelling reasons for such a refusal; they have refused to give any reason. Moreover, it appears that no plausible non-racial reason exists.

D. STATE ACTION

I have made a finding of racial discrimination. However, in order to bring the discrimination of defendant suburbs within the Civil Rights Act, 42 U.S.C. §1983, it is also necessary to find that the officials acted under color of state or local law. *United States v. Carter*, ... U.S. ....., 41 L.W. 4127 (1973). It is necessary, therefore, to deal with defendants' contention that their acts were sanctioned by the federal statute requiring a Local Cooperation Agreement prior to funding, 42 U.S.C. §1415(7) (b) (i), rather than by local law and thus not within the purview of §1983. The major error with this contention is that it rests on the interpretation of §1415(7) (b) (i) when it was passed in 1949 rather than the interpretation which must be followed today after subsequent legislation and court decisions in the civil rights field.

As a general rule, when a federal statute conflicts with later legislation or with judicial interpretations of the Constitution, the courts are under a duty to construe the statute in light of prevailing law, where fairly possible, so that it may be preserved. *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971); *Crowell v. Benson*, 255 U.S. 22, 62 (1932). In this case, the major legal development since the 1949 enactment of §1415(7)

(b) (i) has been the creation of an affirmative duty to promote racial integration on the part of the federal government.

In 1949 the federal government had no legal duty to promote racial integration. The federal authorities were then permitted to stand by while segregation was perpetrated by others. *Bradley v. School Board of City of Richmond, Virginia*, 338 F.Supp. 67, 217, *rev'd on other grounds* 462 F.2d 1058 (4th Cir. 1972). In fact, until 1962 federal officials did not object when local public housing authorities planned developments on a racially segregated basis. 338 F.Supp. at 219.

Since 1949, the Court has ruled that local governments may not encourage the continuation of patterns of racial segregation. *Hunter v. Erickson*, 393 U.S. 395 (1969). Furthermore, under the Fair Housing Act of 1968 and the amendment to programs of federal assistance in 1964, the federal government has an affirmative duty to foster and plan integrated housing. 42 U.S.C. §§2000d, 3601 et seq.; *Shannon v. HUD*, 436 F.2d 809, 816 (3d Cir. 1970); *Crow v. Brown*, 332 F. Supp. 382, 390 (N.D. Ga. 1971), *aff'd* ..... F.2d ..... (5th Cir. 1972); *Gautreaux v. Romney*, 448 F.2d 731, 735-741 (7th Cir. 1971).

Thus, if §1415(7) (b) (i) is read to preserve it in light of the changes and amendments by implication, it would sanction only a refusal to negotiate a Local Cooperation Agreement which was nonracial in character and which is consistent with the duty to foster integration. Under its present interpretation it could not and does not sanction the defendant suburbs' racial discrimination. Thus, the defendant suburbs' refusals were under their authority as local officials and therefore under color of state law so as to be within the purview of §1983.

E. Conclusion

The evidence here shows that the defendant suburbs, acting under color of local law, have refused to negotiate the signing of a Local Cooperation Agreement. Their refusals have had the effect of preventing the construction of badly needed housing for the predominately black applicants who seek residence away from the squalor of the central city. In face of the tragic effect of the defendant suburbs' refusals to negotiate, they have advanced no legitimate nonracial reason and, from the evidence presented, it appears that none exists.

The effects of racial segregation are destroying the community. The predominately black inner city is becoming a concentration of high crime and poor schools. If the Court permits acts such as those of the defendants in this case to block any progress in alleviating the ghetto, it will, in effect, license all those who are able to erect political barriers between themselves and the ghettoes a few blocks away to practice housing discrimination under the guise of local autonomy and to perpetuate the racial division of our community. For the reasons stated above, I would rule that defendant suburbs, under color of local law, have discriminated against plaintiffs on the basis of race in refusing to negotiate the Local Cooperation Agreement which is required under 42 U.S.C. §1415(7)(b)(3).

II. CONSTITUTIONALITY OF THE LOCAL COOPERATION AGREEMENT REQUIREMENT

The crucial issue presented by the challenge to the constitutionality of the Local Cooperation Agreement requirement is the applicability of the doctrine announced in *James v. Valtierra*, 402 U.S. 137 (1971). I believe that

the doctrine does not apply to the statute at issue here and should not be broadened to uphold it.

In *James v. Valtierra*, the Supreme Court upheld the validity of a California constitutional amendment which required a referendum to approve the development of low income public housing. In so doing, the Court emphasized that it was not dealing with a legislative hurdle required only of low income public housing but rather with a constitutional scheme which required the same legislative hurdle for many other kinds of legislation, several of which were listed by the Court in its opinion. 402 U.S. at 142. *See also Sisters of Prov. of St. Mary of Woods v. City of Evanston*, 335 F.Supp. 396, 403 (N.D. Ill. 1971). The Court stated:

> "Furthermore, an examination of California law reveals that persons advocating low-income housing have not been singled out for mandatory referendums while no others group must face that obstacle." 402 U.S. at 142.

In contrast, the Local Cooperation Agreement requirement which is at issue here is unique to low income public housing. Those federally-assisted housing programs which are not for low income persons do not require a local approval. *See, e.g.*, 12 U.S.C. §§1709(b), (h), (i), (m); 1715 e,l., m., n., u., y., z., z-1; and 1713 (federal homeowner mortgage insurance and mortgage subsidy programs); 12 USC §1701q (loans for housing for elderly and handicapped); 38 USC §§801, 1810, 1811 (housing subsidies for veterans). The federally-assisted housing programs for low income persons require local approval or a cooperation agreement. 42 USC §1421(a)(2) (leased housing); P.L. 92-383, 86 Stat. 540 (rent supplement); 42 U.S.C. §3304 (b)(i) (city demonstration).

The fact that local approval is required only for low income housing would require even a mildly cynical person to doubt the general legislative purpose of such a requirement. Moreover, when the reasons advanced for the requirement are examined it is evident that, first, the Local Cooperation Agreement is not required to insure that a local determination of need for low income housing is made. In fact, a local public body, the local housing authority, makes such a determination of need prior to applying for funds. 42 U.S.C. §1415(7)(b)(ii), (iii). Second, the Agreement is not necessary to the establishment of the tax exempt status provided in the federal statutes. Indeed, such exemption is provided within the Housing Act and reaffirmed by state statute. 42 U.S.C. 1410(h); Ohio Rev. Code §3735.34. Third, the slum clearance provisions of 42 U.S.C. §1410(a) have been largely rendered moot by civil rights legislation and the "scattered site" orders which mean that public housing will more often be located in suburban municipalities where no slums exist. 42 U.S.C. §§2000d, 3601; 24 C.F.R. Ch.II, Part 200N. Fourth, the agreement does not insure the consent of the municipality to accept lower payments for municipal services, because the public housing projects must, under federal law, pay for municipal services just as private developers. 42 U.S.C. §1410(i). Finally, it would be unusual to require the Agreement simply because the receipt of ten per cent of rents paid to by public housing rather than taxes may in some instances result in a loss of revenues. Those developing other tax-exempt land uses, such as churches, federal buildings, and universities, do not sign such an agreement although those uses yield no taxes and no payments in lieu of taxes. Thus, there is no general legislative purpose to justify the Local Cooperation Agreement in this case.

Because low income public housing provides for such a large percentage of blacks when compared with the population as a whole, the added obstacle for low income public housing assists localities not only in excluding low income persons but also in excluding blacks.[2] The frequent use of the requirement of local consent to exclude blacks is evidenced by the cases listed below, in which federal courts found that localities trying to prohibit low income housing had racially discriminatory purposes. *Dailey v. City of Lawton*, 296 F.Supp. 266 (W.D. Okla. 1969), *aff'd* 425 F.2d 1037, 1039, 1040 (10th Cir. 1970); *Crow v. Brown*, 332 F.Supp. 383 (N.D. Ga. 1971), *aff'd* 457 F.2d 788 (5th Cir. 1972); *Kennedy Park Homes Association v. City of Lackawanna*, 318 F.Supp. 669 (W.D. N.Y.), *aff'd* 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971); *Hawkins v. Town of Shaw, Mississippi*, 437 F.2d 1286 (5th Cir. 1971); *Banks v. Perk*, 341 F.Supp. 1075 (N.D. Ohio 1972); *aff'd* ..... F.2d ..... (6th Cir. 1973); *Southern Alameda Spanish Speaking Organization v. City of Union City, California*, 424 F.2d 291, 295-296 (9th Cir. 1970); *Gautreaux v. Chicago Housing Authority*, 342 F. Supp. 827, 829 (N.D. Ill. 1972).

Because the legislation at issue here does not come within the holding of *James v. Valtierra*, it is incumbent upon the Court to consider the advisibility of applying the doctrine announced in *Valtierra* to legislation which clearly classifies on the basis of poverty and places an extra legislative hurdle only for those who are seeking low income public housing. I oppose any such broadening of the *Valtierra* doctrine, because I believe that it would render the courts ineffective to enforce the national policy of racial integration.

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2. National Commission on Urban Problems, *Building The American City* 114 (U.S. Govt. Printing Office 1968).

In the past, enforcement of racial integration has been possible through striking down racial classifications for which there was no compelling state interest. More recently, however, as the result of more subtle means of discrimination being adopted, civil rights enforcement has focused upon statutes or acts in which the group treated differently is described without mentioning race to accomplish discriminatory results. Thus, for example, the southern voting districts replaced racial prohibitions with literacy tests and these were struck down, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Lassiter v. Northampton County Board of Elections*; and with voting fees and these were struck down, *Harman v. Forssenius*, 380 U.S. 528, 543, 544 (1965); and with gerrymandering and this was struck down, *Gommilion v. Lightfoot*, 364 U.S. 339 (1960). Employers replaced racial restrictions with intelligence tests and these were struck down. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 432 (1971). In a similar matter, the Local Cooperation Agreement requirement replaced a policy of permitting municipalities to exclude on the basis of race with one permitting exclusion on the basis of poverty—to accomplish the same result.

In conclusion, I agree with the dissenters in *Valtierra* who warned that it is "too late in the day" to treat provisions classifying on the basis of poverty in the housing field as totally benign technical economic classifications which should not be subject to close judicial scrutiny unless applied to areas recognized by the Supreme Court as "fundamental rights" (criminal proceedings, travel, divorce, voting, or privacy). 402 U.S. 145. The integration of metropolitan housing, schools and government cannot effectively be accomplished independently and, although this integration has not been classified as a "fundamental right" by the Supreme Court, it is certainly basic to racial peace

and equality. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972). To fail to scrutinize a poverty classification in housing when it is so frequently used to subvert the courts' efforts to enforce the Fourteenth Amendment is to ignore the means used by white suburban communities in this decade to exclude blacks from their exclusive enclaves within the nations' metropolitan areas. Therefore, I would not extend *Valtierra* to uphold the Local Cooperation Agreement requirement.

/s/ THOMAS D. LAMBROS
United States District Judge

MEMORANDUM OPINION AND ORDER OF DISTRICT COURT

(Filed February 22, 1973)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action C 71-251
ARTIE MAHALEY, *et al.*,
Plaintiffs,

v.

CUYAHOGA METROPOLITAN HOUSING AUTHORITY, *et al.*,
Defendants.

Civil Action C 72-67
DOROTHY M. HARRISON, *et al.*,
Plaintiffs,

v.

CUYAHOGA METROPOLITAN HOUSING AUTHORITY, *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

BATTISTI, C.J.:

The remainder of these consolidated actions have been remanded for my further consideration. The findings of fact set forth in the opinion of the panel are incorporated herein. The question remaining before the court is

whether the defendants have used the consent requirement as a tool to perpetuate segregation in violation of 42 U.S.C. §1983.

Cuyahoga County is a racially segregated county. The population of Cuyahoga County in 1970 was 1,721,300; 328,419 (19.1%) of whom were Negro. 87% of these 328,419 Negroes reside in Cleveland. Of the 40,578 who reside outside of Cleveland but within Cuyahoga County, 80% live in three eastern suburbs: 23,196 in the City of East Cleveland; 5,250 in Shaker Heights; and 4,007 in Warrensville Heights. In 1970 the defendant City of Garfield Heights had 1,789 Negro (4.6%) residents. All but two resided in one area of Garfield Heights adjacent to the City of Cleveland. The other four defendant suburban cities' population in 1970 was from 99.1% to 99.8% Caucasian.

In *Banks, et al. v. Perk, et al.*, 341 F.Supp. 1175 (N.D. Ohio 1972) the following findings of fact were made as to the City of Cleveland and are incorporated herein:

> "The City of Cleveland is a racially divided city. Except for a small pocket of Negroes on the west side of the Cuyahoga River, in the Bellaire Section, almost all (96%) of the Negro citizens of the City live on the east side of the River. The Negro population of the City of Cleveland has grown dramatically since 1930 when Negroes constituted only 8% of the total population of the City. Today it is more than 38%. Since 1950 three neighborhoods on the east side of Cleveland, Hough, Glenville and Lee-Seville, have changed from primarily White to almost entirely Negro. As a result, the schools in the City of Cleveland are quite badly segregated. Of the 183 public schools in the City, 85 are 90% to 100% Negro, and 72 are

under 10% Negro. Approximately 95% of the Negro children attending public schools in the City attend schools which are all or substantially all Negro. In addition, in the last six years more than 5,000 jobs have moved from Cleveland's inner city to the outskirts of the City and to nearby suburbs. Access to these jobs has decreased for those who live in the inner city." 341 F.Supp at 1178.

To live in the inner city is all too often not a badge of slavery. Often it is a badge of poverty. Far too often, indeed quite regularly in this city, it is a badge or indicia of both slavery and poverty. Being relegated to live in the decaying center of a city is tragic indeed. Its effects are legion—segregated schools of poor quality, denial of access to jobs, ineffective health services, generally poorer health, higher rate of infant mortality—the list seems endless. The only contact far too many of us have with the center of Cleveland is what we see as we drive from our downtown offices to our homes which ring the center city. At present, Cuyahoga County has the racial shape of a donut, with the Negroes in the hole and with mostly Whites occupying the ring.

There is no question that there is a need for low income housing throughout Cuyahoga County. As of November 30, 1971, there were 5,652 pending applications to all CMHA housing units. 73% of these applicants were Negro. 4,040 of the pending applications were for family rather than elderly units. 86% of these applications for family units were made by Negroes. The average waiting period of an applicant for CMHA housing was as follows:

Bedroom Needed	Average Waiting Time
Efficiency	No Wait
One	2 Months
Two	8 Months
Three	12 Months
Four	12 Months
Five	18 Months
Six or more	3 Years or more

Many of the pending applications for admission into CMHA housing units are from families who reside in a municipality within Cuyahoga County other than the City of Cleveland. 484 persons who presently reside in CMHA housing located in the City of Cleveland were residents of a municipality in Cuyahoga County other than the City of Cleveland at the time they became residents of CMHA housing.

CMHA and the Planning Commission of Cleveland have made studies which show a need for many additional units of low rent housing within the territorial jurisdiction of CMHA both in Cleveland and in Cuyahoga County outside Cleveland. These studies show the need for low rent housing in every municipality within Cuyahoga County including the defendant suburban cities. The records of the Cuyahoga County Welfare Department show that there are residents in each of the defendant suburban cities who receive public assistance. Persons receiving such assistance are among those who qualify for admission to CMHA housing. Actually there may be more.

Since 1968 the national policy of HUD has been the dispersal of low rent housing outside the Negro and lowest income neighborhoods. Recently defendant CMHA has adopted this policy within Cleveland, see *Banks v. Perk*, supra, and has attempted to follow this policy in the suburbs of Cleveland. CMHA has sought Cooperation Agreements with all of Cleveland's suburbs but has received

no positive response. The City of Cleveland signed Cooperation Agreements in 1937, 1941, 1949 and most recently in 1971. These agreements authorized CMHA to build a total of 14,000 units in Cleveland.

Prior to the commencement of C 71-251, CMHA wrote to the Mayor or City Manager of every municipality within its territorial jurisdiction, including the suburban defendants, concerning low rent public housing programs available to suburban communities and enclosed with each letter a brochure describing their housing programs. No response was received from any suburban city, except Parma Heights, not a defendant herein, which indicated that it would not permit subsidized housing in their community. Prior to the commencement of C 71-251, staff representatives of CMHA contacted representatives of many suburban municipalities within the territorial jurisdiction of CMHA concerning various low rent public housing programs available to their communities. CMHA mailed its 1969 Annual Report to the Mayor of each municipality in Cuyahoga County which contained a request that all municipalities consider low rent public housing for their communities. In 1970 The Cleveland Planning Commission recommended that the city, in association with CMHA, press for Cooperation Agreements with the greatest possible number of suburban municipalities in order to offer low income families a wider choice of housing options in the entire region.

In January, 1971, The Cleveland Planning Commission recommended that each community in the county accept a number of public housing units equalling 2% of the total families residing in the community because the City of Cleveland could not be expected to solve the entire low income housing crisis. It is clear that if there is to be a solution, it must be within the framework of a regional housing market. In keeping with the approach, the Direc-

tor of CMHA met with the Mayor of the City of Garfield Heights in 1969 and discussed public housing for that city and the need for a Cooperation Agreement. In late 1969 or early 1970, the Mayor of the City of Westlake met with CMHA officials and the low income housing programs available and the requirements of a Cooperation Agreement were explained to him.

In 1969 CMHA officials met with the Mayor of Euclid and proposed a project on some city owned vacant land. The Director of CMHA met with the Mayor and President of City Council of Euclid at their request in 1971 and discussed public housing programs to solve relocation problems caused by the demolition of approximately 550 units of the City of Euclid's Briardale Housing Project. Such units have been demolished in the last two years without making any further provisions for low income housing within the City.

At a meeting in the City of Parma attended by the Mayor, the CMHA Director gave information regarding public housing, its benefits and the requirement of a Cooperation Agreement. CMHA officials have spoken as often as possible to any and all groups regarding the public housing program and the Cooperation Agreement. At each of the meetings with officials and representatives of the defendant suburbs, the CMHA Board's policy of being ready and willing to take any and all steps necessary for the development of low income housing in the respective suburbs was explained and it was understood that all that was necessary to start the process was an initial approval or indication of interest by the respective suburb. No favorable response, indication of further interest, or request for further study of CMHA programs, has ever been received by CMHA from the various meetings and discussions it has had with officials and representatives of the defendant suburbs or from the correspondence sent.

On March 1, 1972, Director Fitzgerald sent another letter to all the Mayors and Chief Executives in their territorial jurisdiction. The only response was extremely negative. On September 1, 1972 another such letter was sent. This letter enclosed an updated study of the need for low income housing in each municipality within CMHA's territorial jurisdiction. This letter stands unanswered. It should be noted that the cities of Cleveland, East Cleveland, Oakwood and Cleveland Heights have Cooperation Agreements with CMHA.

CMHA's policy toward these suits is largely neutral in that they stand ready to negotiate a Cooperation Agreement with each and every city in Cuyahoga County and simultaneously stand ready to build without the necessity of the Agreement, should this court so decide. However, it is particularly troubling that suburban officials have largely ignored CMHA's requests to negotiate a Cooperation Agreement. Clearly, there is a need in each community within the territorial jurisdiction of CMHA. There is an approximate need for the following number of additional units of low income family and elderly housing in each of the defendant suburbs:

	Family	Elderly
Euclid	1545	252
Garfield Heights	931	151
Parma	1873	232
Solon	145	13
Westlake	233	38

There is a total need of 4,727 family units and 686 elderly units of public housing in the defendant suburbs. There is an approximate need of an additional 35,778 family units and 6,314 elderly units of public housing in the City of Cleveland.

If Cleveland is to become a thriving city once more, its housing needs must be met and its housing patterns must not perpetuate segregation. An avenue must be found to allow inner city dwellers to move to the suburbs, where many of the jobs have been moving. In *Banks*, CMHA and the City of Cleveland were charged with the leadership to integrate housing patterns in Cleveland. This can only be viewed as a temporary solution. CMHA, the City of Cleveland and the municipalities within Cuyahoga County must act together if segregation in racial housing patterns is to be once and forever eliminated.

The Housing Act of 1937, as amended in 1949, 42 U.S.C. §§1401 *et seq.*[1] established "the goal of a decent home and a suitable living environment for every American family." The 1964 Act mandated that "no person . . . be excluded from participation in, be denied the benefits of or be subjected to discrimination under any program or activity receiving Federal financial assistance." In 1968 Congress proclaimed that the policy of the United States is to provide fair housing throughout the nation. And in recent HUD regulations the duty of local agencies to develop balanced and dispersed public housing in non-racially concentrated areas has been mandated.

The impact of this policy on governmental units throughout the United States can be seen in the recent judicial decisions interpreting the national policy. In *Shannon v. HUD*, 436 F.2d 809, 816 (4th Cir. 1970), the court stated:

> "Read together, the Housing Act of 1949 and the Civil Rights Act of 1964 and 1968 show a progression in the thinking of Congress as to what factors signifi-

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1. The question of the constitutionality of this section has been briefed. The court has found the arguments of CMHA most compelling and has largely adopted its analysis.

> cantly contributed to urban blight and what steps must be taken to reverse the trend or to prevent the recurrence of such blight . . . Whatever were the most significant features of a workable program for community improvement in 1949, *by 1964 such a program had to be non-discriminatory in its effects, and by 1968 the Secretary had to affirmatively promote fair housing.*" 432 F.2d at 815. (Emphasis added).

And in *Crow v. Brown*, 332 F.Supp. 382, 390 (N.D.Ga. 1971) aff'd. 457 F.2d 788 (5th Cir. 1972), Judge Edenfeld summarized the impact of this policy by stating:

> "For better or for worse, both by legislative act and judicial decision, this nation is committed to a policy of balanced and dispersed public housing. (Citations omitted). Among other things, this reflects the recognition that in the *area of public housing local authorities can no more confine low income blacks to a compacted and concentrated area than they can confine their children to segregated schools.*" (Emphasis added).

The court in *Crow* found that the municipality's actions frustrated attempts made by the Atlanta Housing Authority to reverse the trend of racial concentration and held:

> "Taken together and viewed in their historical context, the actions of the County in resisting attempts designed to achieve the national housing policy of balanced and dispersed public housing and failing to assist such attempts violate the Equal Protection Clause of the Fourteenth Amendment. Relief from this violation of the constitutional and statutory rights of plaintiffs (blacks on AHA waiting list) must be granted by this court."

See also *Banks v. Perk*, 341 F.Supp. 1175 (N.D.Ohio 1972).

In view of the factual showings of the almost all-white character of the suburbs, the high percentage of Negroes in CMHA housing and on CMHA waiting lists, and the need for low income housing both on a community and on a metropolitan basis, the refusals or failures to respond to CMHA's requests to initiate public housing were intended to, and have had the effect of excluding Negroes and perpetuating racial segregation contrary to the national housing policy.

It is a well established point of law that intention or motive to discriminate need not be directly proven in order to establish discrimination contrary to the Fourteenth Amendment, the various Civil Rights statutes or the national housing policy. " 'Equal protection of the law' means more than merely the absence of governmental action designed to discriminate." *Hawkins v. Town of Shaw, Mississippi*, 437 F.2d 286 (5th Cir. 1971). "If proof of a civil rights violation depends on an open statement by an official of an intent to discriminate, the Fourteenth Amendment offers little solace to those seeking its protection." *Dailey v. Lawton*, 296 F.Supp. 266, aff'd. 425 F.2d 1037 (10th Cir. 1970).

Judge J. Skelly Wright has succinctly expressed the rationale for looking to the effect of a party's actions or inactions:

> "Whatever the law once was, it is a testament to our maturing concept of equality that, with the help of Supreme Court decisions in the last decade, we now firmly recognize that the *arbitrary quality of thoughtlessness can be as disastrous to private rights and to the public interest as the perversity of a willful scheme.*" (Emphasis added).

Hobson v. Hansen, 296 F.Supp. 401, 497 (D.D.C. 1967), aff'd. sub nom., *Smuck v. Hobson,* 408 F.2d 175 (D.C.Cir. 1969) (en banc).

Many civil rights cases brought against municipalities for interference, indifference, or inaction relative to attempts to alleviate segregation within their jurisdictions by the development of public housing have held that when the result of said action is discrimination it cannot be viewed as within the normal bounds of municipal discretion. See *Crow v. Brown,* 332 F.Supp. 382 (N.D.Ga. 1971), *aff'd.* 457 F.2d 788 (5th Cir. 1972); *Kennedy Park Homes Association v. City of Lackawanna,* 318 F.Supp. 669 (W.D. N.Y.), *aff'd.* 436 F.2d 108 (2d Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971); *Dailey v. City of Lawton,* 296 F.Supp. 266 (W.D.Okla. 1969), *aff'd.* 425 F.2d 1037 (10th Cir. 1970); *Hawkins v. Town of Shaw, Mississippi,* 437 F.2d 1286 (5th Cir. 1971); *Banks v. Perk,* 341 F.Supp. 1175 (N.D.Ohio 1972).

The teaching of these cases is that any municipal conduct which has the purpose or effect of discriminating against Negroes or perpetuating racial concentration or segregation in housing is violative of the civil rights of Negroes and a denial of equal protection, absent a showing by the municipality of a supervening and compelling necessity. Under the rule of these cases, given a *prima facie* showing of discriminatory effect, the cities must come forward with a supervening necessity or compelling interest to overcome a finding of discrimination. *Crow v. Brown, supra; Kennedy Park Homes Association v. City of Lackawanna, supra.*

The case of *Crow v. Brown,* 332 F.Supp. 382 (N.D.Ga. 1971), aff'd. 457 F.2d 788 (4th Cir. 1972) is applicable. *Crow* dealt with the housing crisis in Atlanta and its surrounding suburbs, but [illegible] elements and roots of At-

lanta's problems are very similar to the problems demonstrated on the record herein. Most of Atlanta's public housing had been built in the central city in or near the slums. At the time suit was brought, approximately 75% of Atlanta's public housing was located in predominantly Negro areas. Also, as in Cleveland, over 80% of the tenants on the waiting list for public housing were Negro. The inner-city-suburban situation is also analogous. As the trial court found:

> "While poor blacks have been attracted to the low-rent public housing in Atlanta and the city's problems have rapidly mounted, whites have been fleeing in increasing numbers. In 1960 35% of the residents of Atlanta were black; today 51% are black. The public school population of Atlanta was 30% black; today it is 70% black. A fair percentage of the whites leaving Atlanta have moved to the unincorporated areas of Fulton County; a similar percentage of blacks from those areas have moved to the city.
>
> Within the immediate future, unless drastic changes occur, it is not merely possible but certain that Atlanta will become, in essence, a black city within a solid white perimeter. *Id.* at 384.

In *Crow* not a single unit of low rent public housing had been built in the unincorporated areas of the county outside the city. The case arose when county officials failed to give necessary approvals and permits for the construction of two of the first federally subsidized low income housing projects to go into the all-white county. The consequences of racial segregation and concentration in Atlanta parallel Dr. Turner's (expert witness for the plaintiffs) appraisal herein, for as the court found:

"One of the consequences of this racial concentration is that it has become virtually impossible to achieve meaningful school desegregation . . . a second consequence has been a swelling of the unemployment rolls in the city since job opportunities have become more scarce each year. Although they have increased in the suburbs.

It is entirely possible that a greater concentration of Negroes in the central cities would be accompanied by an increase in tension and violence." *Id.* at 391.

In light of the above, the court in *Crow* found the county's actions in failing to permit and assist the construction of the public housing to be unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. It held:

"The county defendants testified that they are aware of these conditions, yet they have come forward with *no justification, compelling or otherwise,* for their passivity, their refusal to cooperate, indeed their active opposition to plans designed to alleviate them.

Given the decisions previously cited, it is abundantly clear that, *in the absence of supervening necessity any county action or inaction intended to perpetuate or which in effect does perpetuate the conditions just described cannot stand.* Nor can county action or inaction which would thwart their correction be permitted to continue." (Emphasis added).

It is important to note that in *Crow* the court disregarded the Atlanta-Fulton County boundary line in reviewing the metropolitan housing crisis. It found the county's resistance to the achievement of the goals of the national housing policy, balanced and dispersed public housing, to be

violative of the constitution. Although it could be argued that this was only permissible because the Atlanta Housing Authority had a Cooperation Agreement with Fulton County, this argument fails. The Cooperation Agreement Requirement itself indicates its only purpose is that there be a "local determination of the need for low rent housing" and thus, given a metropolitan housing crisis caused by segregated housing together with attempts to alleviate same, it does not matter whether the unconstitutional inaction and impediment to correction is occasioned by improper application of local ordinance or federal law. The deprivations and discriminatory effect are the same.

In *Kennedy Park Homes Assn. v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970) similar municipal interference with a housing project being developed in an all-white area of a highly segregated city was held violative of the prospective tenants' rights to be free from discrimination. Mr. Justice Clark writing for the Court held:

> The plaintiffs sought to exercise their constitutional right of 'freedom from discrimination by the States in the enjoyment of property rights.' *Shelley v. Kraemer*, 334 U.S. 1, 20, 68 S.Ct. 836, 845, 92 L.Ed. 1161 (1948). The effect of Lackawanna's action was inescapably adverse to the enjoyment of this right. In such circumstances the City must show a compelling governmental interest in order to overcome a finding of unconstitutionality. *Shapiro v. Thompson*, 394 U.S. 618, 634, 89 S.Ct. 1322, 22 L.Ed. 600 (1969). The City has failed to demonstrate an interest so compelling. *Id.* at 114.

In *Lackawanna* the city officials argued that whatever the effect of their actions, it resulted from thoughtlessness rather than a purposeful scheme and thus was not

unconstitutional. The court rejected that argument and stated that even if this were the case:

> "the City may not escape responsibility for placing its black citizens under a severe disadvantage which it cannot justify." *Id.*

And in *Dailey v. City of Lawton*, 425 F.2d 1037 (10th Cir. 1970) after finding a *prima facie* showing of discrimination the court said:

> "The racial prejudice alleged and established by the plaintiffs must be met by something more than bold, conclusory assertions that the action was taken for other than discriminatory reasons." *Id.* at 1039-40.

In *Banks v. Perk*, 341 F.Supp. 1175 (N.D.Ohio 1972) this test was applied in finding the City of Cleveland guilty of discrimination, in holding that:

> "in the absence of any supervening necessity or compelling governmental interest, any municipal action or inaction, overt, subtle or concealed, which perpetuates or reasonably could perpetuate discrimination, especially in public housing, cannot be tolerated."

See also, *Hawkins v. Town of Shaw, Mississippi*, 437 F.2d 1286 (5th Cir. 1971).

As found in *Crow* and *Banks*, the above test of discrimination is no less applicable if the discriminatory effect results from mere failures or refusal to act as opposed to overtly affirmative discriminatory action. The inaction is just as much "state action under color of law" as the overt act and thus comes within the ambit of the Equal Protection Clause of the Fourteenth Amendment. As was stated in *Avery v. Midland County*, 390 U.S. 474, 484 (1968):

". . . a decision not to exercise a function with (a municipality's) . . . power—a decision, for example, not to build an airport or a library, or not to participate in the federal food stamp program—is just as much a decision affecting all citizens of the county as an affirmative decision."

And in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961) the Supreme Court held that inaction of a state agency, as lessor, in failing to affirmatively require non-discrimination on the part of a lessee, was nevertheless "state action". In so holding, the Court stated:

"*No state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be.* It is no consolation to the individual denied the equal protection of the laws that it was done in good faith . . ." (Emphasis added).

Where there is *prima facie* evidence of discrimination, the burden is shifted to the defendant suburbs to come forward with a supervening necessity or compelling governmental interest to avoid a finding of unconstitutionality. See *e.g. Kennedy Park Homes Assn. v. City of Lackawanna, supra; Crow v. Brown, supra; Banks v. Perk, supra.*

The suburban defendants offer no compelling reason to justify their failure to sign a Cooperation Agreement. The defendant suburbs made bald allegations that their failure to act or enter into Cooperation Agreements was not motivated by racially discriminatory reasons. They offered only allegations of no need for low income housing and their fear of a property tax loss. Neither reason was supported by the evidence, and the latter should not be considered adequate or compelling even if proof had been offered.

The evidence indicates a need for additional public housing in the entire county and in each suburb as well. The 1970 CMHA study, the Fair Share Plan, and the 1972 CMHA study all convincingly indicate and demonstrate this need. Against this, is the bare assertion that there is no need. Such an assertion must fall before the weight of the evidence.

The only other argument or rationalization offered for the failure or refusal of the defendant suburbs to enter into a Cooperation Agreement has been an alleged fear that the introduction of tax exempt public housing within a municipality would result in a financial loss. However, there was absolutely no evidence introduced to support said allegation. In fact, the evidence was to the contrary. Norman Krumholz, Director of the City Planning Commission of the City of Cleveland, testified that with sound planning and cooperation between a municipal or county planning commission and a housing authority, a plan could be devised for the development of public housing which would not reduce the net revenue to an individual municipality or to the county as a whole.

Even if there were some proof of tax loss, this fact is insufficient. Property of CMHA is exempt from taxation by virtue of state law pursuant to Section 3735.34, Ohio Revised Code. If the state has seen fit to exempt housing authority property from taxation, the municipalities have no authority to interfere with the statutory powers of another political subdivision. *Willoughby Hills v. Board of Park Commissioners,* 3 Ohio St.2d 49 (1965). The use of these transparent and flimsy rationalizations indicates quite clearly that the conduct of the municipalities was designed to exclude public housing and the Negroes who, obviously, will inhabit this type of housing.

The evidence amply demonstrates that the suburban defendants' failures and refusals to contract, negotiate with CMHA, or enter into Cooperation Agreements, have the clear effect of discriminating against Negroes by excluding them from residing in these suburban municipalities and perpetuating existing racial concentration and segregation within the individual suburbs and throughout the metropolitan area. In the face of this evidence, the suburban defendants came forward with no logical rationale, compelling or otherwise, to explain their conduct. The record indicates that the actions of the defendant suburbs under color of law, discriminate against Negroes and other low income persons. Such actions violate the plaintiffs' rights to equal protection of the law under the Fourteenth Amendment to the United States Constitution and are in violation of their rights under the various Civil Rights Acts. See 42 U.S.C. Sections 1981, 1982, 1983, 2000(d) and 3601 *et seq.*

The national housing policy requires that CMHA develop public housing on a balanced and dispersed basis. See 42 U.S.C. Section 2000(d) and HUD Site Selection Criteria, 24 C.F.R. Chapter II, Part 200, Subpart N. This duty has been recognized by a number of courts. In *Crow v. Brown*, 332 F.Supp. 362, 390 (N.D.Ga. 1972), aff'd. 457 F.2d 788 (5th Cir. 1972), the court stated:

> (B)oth by legislative act and judicial decision, this nation is committed to a policy of balances and dispersed public housing. See *Kennedy Park Homes Assn. v. City of Lackawanna*, 318 F.Supp. 669 (W.D. N.Y.), aff'd. 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010, 91 S.Ct. 1256, 28 L.Ed. 546 (1971); *Dailey v. City of Lawton*, 296 F.Supp. 266 (W.D.Okl. 1969), aff'd. 425 F.2d 1037 (10th Cir. 1970); *Gautreaux v. Chicago Housing Authority*, 296 F.Supp. 907 (N.D.

Ill. 1969), enforced in 304 F.Supp. 736, aff'd 436 F.2d 306 (7th Cir. 1970), cert. denied, 402 U.S. 922, 91 S.Ct. 1378, 29 L.Ed. 2d 661 (1971); *Hicks v. Weaver*, 302 F.Supp. 619 (E.D.La. 1969).

CMHA acts as an agent and instrumentality of the federal government in carrying out the national housing policy. It would be inconsistent then to read the Cooperation Agreement Requirement so as to give the defendant suburbs the power to arbitrarily say "no" to the implementation of this federal policy. Rather, the Requirement must be read as only authorizing the defendant suburbs to make a good faith, objective determination of need. If there is in fact no need for low income housing, then the determination should stand. But where a known and proven need is clearly present, the defendant suburbs cannot be permitted to thwart the implementation of the national policy by ignoring the need or by making arbitrary determinations to the contrary.

In *SASSO v. City of Union City*, 424 F.2d 291 (9th Cir. 1970) the Ninth Circuit stated:

> "Given the recognized importance to equal opportunities in housing, it may well be, *as matter of law*, that it is the *responsibility of a city* and its planning officials *to see that the city's plan* as initiated or as it develops *accommodates the needs of its low-income families*, who usually—if not always—are *members of minority groups.*" (Emphasis added).

See also, *Banks* v. *Perk*, 341 F.Supp. 1175 (N.D.Ohio 1972).

Thus, the Cooperation Agreement Requirement of federal law in delegating federal discretion to the local governing bodies of the defendant suburbs carries along with

it the requirement that this discretion be exercised in light of the national housing policy of balanced and dispersed public housing. The conduct of the defendant suburbs therefore violates the spirit and letter of the national housing policy, CMHA's rights and duties thereunder, and the Fourteenth Amendment.

The City of Cleveland's entire defense has centered on the reasonableness and alleged sufficiency of the 1971 Cooperation Agreement with CMHA. However, the events and actions leading to the execution of that Cooperation Agreement and the City's subsequent actions in revoking building permits for public housing and in attempting to cancel the Agreement are all inconsistent with the City's position and contrary to the above developed law. The legality of many of these acts on the part of the separate defendant, City of Cleveland, have already been ruled upon by the court in *Banks v. Perk,* 341 F.Supp. 1175 (N.D.Ohio 1972) and in *CMHA v. City of Cleveland,* 342 F.Supp. 250 (N.D.Ohio 1972). Both of these cases are on appeal to the United States Court of Appeals for the Sixth Circuit.

It was, however, established in these cases that Cleveland's actions in revoking building permits for public housing projects in White areas were in part based on racial considerations and constituted discrimination against the low income Negroes who were residents in and on the waiting list for CMHA public housing. And in *CMHA v. Cleveland, supra,* this court found that the City's attempt to cancel the 1971 Agreement impaired the obligations of CMHA's contract with the City, constituted harassment of CMHA, interfered with its contractual relationship and its contractors, and effectively discriminated against CMHA's beneficiaries.

Since Cleveland has signed a Cooperation Agreement, since it is subject to this court's jurisdiction in *Banks v. Perk, supra,* and since the Cooperation Agreement could not be repealed, *CMHA v. City of Cleveland, supra,* Cleveland can not be held to have used the Cooperation Agreement requirement in a discriminatory manner. However, should it be held that the Cleveland City Council may repeal its Cooperation Agreement with CMHA or should CMHA exhaust the units available under the 1971 agreement, the principles stated above would apply to Cleveland should it then fail to enter into a Cooperation Agreement.

The refusal or failure of the defendant suburbs to make a determination of need for public housing in their communities is arbitrary and unreasonable in the face of the clear evidence of such need. Such action or inaction can be found to have intended the exclusion of not only the low income poor, which CMHA was created to house, but more particularly low income Negroes who make up a large percentage of CMHA's occupancy and waiting list.

The foregoing is contrary to the Thirteenth Amendment and the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution, the Civil Rights Act of 1964 and 1968, Title 42 U.S.C. Sections 1981, 1982, 1983, 2000(d) and 3601 *et seq.*, the United States Housing Act of 1937 as amended, and regulations of the Department of Housing and Urban Development.

This court is faced with a dilemma of some constitutional significance. It is clear that state officials are acting under color of law and are performing acts which have, at the very least, discriminatory effect. However, the law they are using to perpetuate discrimination is a fed-

eral rather than a state law. State officials are refusing to sign a federally required document with the resulting effect of discrimination. Two potential solutions are offered. One is the issuance of a declaration that this statute is unconstitutional as applied. While this argument is beguiling, it simply does not accurately describe the remedy. The statute is not unconstitutional as applied to the plaintiffs but rather it has been used in such a way as to perpetuate discrimination. It has been argued that state officials can not abuse a federal requirement to promote segregation because to do so would violate *Bolling v. Sharpe*, 347 U.S. 497 (1954) and *Hurd v. Hodge*, 334 U.S. 24 (1948). This argument is also beguiling but not compelling for *Bolling* was the application of *Brown v. Board of Education*, 347 U.S. 483 (1954) to the District of Columbia, and *Hurd v. Hodge* applied *Shelley v. Kraemer*, 334 U.S. 1 (1948) to the District of Columbia. It is true that *Bolling* incorporated the equal protection guarantees within the due process clause of the Fifth Amendment. But these cases can not be applied in this cause in such a way as to declare this statute unconstitutional. To do so would bend *Bolling* and *Hurd* far out of shape. Therefore the statute ought not to be declared unconstitutional.

A second solution has been proposed. This method is far more complicated than the first but seems to be the only constitutionally permissible solution. CMHA is ordered to prepare a plan setting forth the number of scattered site units it intends to place in each of the defendant suburbs. The plan should reflect the needs of each suburban city for low income and elderly housing and should indicate the number of units which would be used to house those residents of the City of Cleveland who wish to move into that community. In preparing

the plan CMHA should examine the needs of each suburban community in Cuyahoga County recognizing that it can only be effectuated as to the defendant suburban cities. It should not include specific locations in each suburb, but should rather reflect a numerical need. The plan is to be submitted within 90 days. Objections and any counter-proposals are to be submitted 90 days thereafter by the plaintiffs and the defendants. Included in the objections should be an analysis of the reasons why the defendant suburbs can not absorb the number of houses which CMHA desires to build there. This court recognizes that it is the responsibility of the defendant suburbs to accept their constitutional obligation in this matter. Therefore it encourages that during the next 180 days negotiations be begun with CMHA in order that an amicable resolution be attained. Should negotiations prove fruitless, a hearing will be held soon after the receipt of the objections. It is anticipated that the cities may offer some reasons in opposition to CMHA's plan. Unless the reasons presented at the subsequent hearing are constitutionally permissible and meet the compelling interest test, there will be no alternative but to conclude that the suburb's failure to sign a Cooperation Agreement is for a constitutionally impermissible reason, to wit: racial discrimination and appropriate judicial action will be undertaken.

/s/ FRANK J. BATTISTI
Chief Judge

ORDER OF THE DISTRICT COURT

(Filed February 22, 1973)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action C 71-251

ARTIE MAHALEY, *et al.*,
Plaintiffs,

v.

CUYAHOGA METROPOLITAN HOUSING AUTHORITY,
et al.,
Defendants.

Civil Action C 72-67

DOROTHY M. HARRISON, *et al.*,
Plaintiffs,

v.

CUYAHOGA METROPOLITAN HOUSING AUTHORITY,
et al.,
Defendants.

ORDER

BATTISTI, C.J.:

The Cuyahoga Metropolitan Housing Authority is ordered to submit a plan to this court which indicates as accurately as possible the number of units which are necessary to reflect the need of each suburban city for low-

income and elderly housing and should indicate the number of units to be used to house those residents of the City of Cleveland who would wish to move into that community. The plan should reflect the needs of each municipality in Cuyahoga County. The plan should be submitted within 90 days. Objections to the CMHA plan should be filed 90 days thereafter.

IT IS SO ORDERED.

/s/ FRANK J. BATTISTI
Chief Judge

DEC 9
MICHAEL RODAK,

Supreme Court of the United States

October Term, 1974
No. 74-562

ARTIE MAHALEY, *et al.*,
Petitioners,

vs.

CUYAHOGA METROPOLITAN HOUSING AUTHORITY, *et al.*,
Respondents,

and

CITY OF EUCLID, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS CITY OF PARMA AND ITS MAYOR AND MEMBERS OF COUNCIL

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Supreme Court of the United States

October Term, 1974
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ARTIE MAHALEY, *et al.*,
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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS CITY OF PARMA AND ITS MAYOR AND MEMBERS OF COUNCIL

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 500 F.2d 1087 (6th Cir. 1974) (Petitioners' Appendix A1-A31). The opinion of the single-Judge District Court, upon which the appeal to the Court of Appeals was taken, is reported at 355 F. Supp. 1257 and reproduced in

the Petitioners' Appendix (A58-A80). The opinion of the three-Judge District Court, reported at 355 F. Supp. 1245 (Petitioners' Appendix A34-A57), is of pertinence here only insofar as it provides background for the issues decided below, inasmuch as that final decision was not appealed to this Court and is therefore res judicata.

JURISDICTION

The jurisdictional requisites adequately appear in the Petition.

QUESTION PRESENTED FOR REVIEW

Whether a single-Judge District Court has authority to order a public housing agency, which is a body politic and corporate under State law, to submit a plan setting forth the number of low-rent housing projects the agency intends to place in each of the five defendant cities when they have neither requested such projects nor voluntarily entered into a cooperation agreement required by 42 U.S.C. § 1415 (7), and when only an hour before a three-Judge Court in the same action and on the exact same evidence had found and determined that the cooperation agreement requirement is constitutional both on its face and as applied?

The Court of Appeals, one judge dissenting, ruled it had jurisdiction over the appeal filed by the five defendant cities and answered the question "No". Respondents submit that the answer of the Court of Appeals is correct and should not be reviewed.

STATUTE INVOLVED

The statute involved is set out in the Petition.

STATEMENT OF THE CASE

This action was filed by three Cleveland residents, who claim to be eligible for public housing, and an association interested in public housing named PATH. It was filed against Cuyahoga Metropolitan Housing Authority (CMHA), a public housing agency which is a body corporate and politic under Ohio law, members of its Board and its Executive Director; the cities of Euclid, Garfield Heights, Parma, Solon, and Westlake, Ohio, which are likewise bodies corporate and politic under Ohio law, and their respective Mayors and councilmen; the Department of Housing and Urban Development of the United States (HUD) and its then Secretary, George Romney. There are 56 municipal corporations within the territorial jurisdiction of CMHA. The five defendant cities' motion to join the other 51 municipal corporations as defendants was denied by the District Court.

On August 26, 1971, the District Court ordered plaintiffs' complaint dismissed as to the Executive Director and members of the Board of CMHA.

In the first count of the complaint, the plaintiffs attacked the constitutionality of the cooperation agreement requirement of the United States Housing Act of 1937, as amended, 42 U.S.C. § 1415 (7). Count Two was brought under 42 U.S.C. § 1983 and alleged that the five municipalities had used the requirement to exclude plaintiffs and the class they represented from living in those munic-

ipalities. They prayed for an order directing CMHA to construct low-rent housing units in the five municipalities despite the cooperation agreement requirement of the Act.

A trial was conducted before the three-Judge Court convened to consider the constitutional aspects of the action. On February 22, 1973, in a signed Memorandum Opinion and Order stamped filed by the Clerk at 11:06 o'clock a.m., the three-Judge Court found and determined that the cooperation agreement requirement of the Act is "constitutional both on its face *and as applied*. . . ." (Emphasis added.) The order then dissolved the three-Judge panel and referred determination of Count Two to a single Judge to determine "whether the defendants' conduct violated the provisions of 42 U.S.C. § 1983". 355 F. Supp. 1250 (Petitioners' App. A43). One Judge dissented. On the same day, at 12:14 o'clock p.m., there was filed with the Clerk of the District Court a Memorandum Opinion and Order of the single Judge, in which he completely disposed of the issue referred to him by the three-Judge panel without further hearing or argument. The single Judge ordered CMHA "to prepare a plan setting forth the number of scattered site units it intends to place in each of the defendant suburbs . . . and should indicate the number of units which would be used to house those residents of the City of Cleveland who wish to move into that community." The plan was to be submitted to the District Court within 90 days by CMHA. The suburbs were given 90 days thereafter to object and give reasons if they had any why they cannot absorb the number CMHA desires to build there. The single Judge warned that if the suburbs' reasons in opposition to CMHA's plan were not constitutionally permissible and did not meet the compelling interest test, appropriate judicial action would be undertaken. (355 F. Supp. 1269, Petitioners' App. A79-A80).

Neither plaintiffs nor CMHA filed any appeal to this Court from the February 22, 1973 Order of the three-Judge Court determining that 42 U.S.C. § 1415 (7) is constitutional both on its face and as applied and entering judgment for defendants on Count One. That judgment became final when the time for appeal expired and is res judicata.

Defendants appealed to the Court of Appeals for the Sixth Circuit. The Court of Appeals on December 3, 1973 unanimously denied motions to dismiss the appeal for alleged lack of jurisdiction over a final order, filed by plaintiffs and CMHA, citing *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964). On the merits, the Court of Appeals reversed the judgment of the District Court and remanded the cause for dismissal of the Complaint. One judge dissented, and, although having concurred in overruling the motions to dismiss for alleged lack of jurisdiction, unilaterally brought up the matter again in his dissenting opinion.

CMHA, an appellee below, did not file in this Court any petition for a writ of certiorari. Only CMHA could be a contracting party to a cooperation agreement; petitioners would not be parties to any cooperation agreement with the defendant cities.

REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals on the merits is in harmony with and correctly applied the decisions of this Court in *James v. Valtierra*, 402 U.S. 137 (1971), *Palmer v. Thompson*, 403 U.S. 217 (1971), *Lindsey v. Normet*, 405 U.S. 56 (1972), and *City of Kenosha v. Bruno*, 412 U.S. 507 (1973). In determining that it had jurisdiction of the appeal under 28 U.S.C. § 1291, the Court of Appeals correctly

applied and followed *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), and is in accord with decisions in other circuits applying *Gillespie*.

Petitioners raise no issues of substance and demonstrate no special and important reasons warranting review. Instead, their Petition dwells on the findings of the District Court and contains a glaring error in the fourth paragraph on Page 21. The Court of Appeals did indeed dispute the findings of the District Court. At 500 F.2d 1087, 1091, footnote 3 (Petitioners' App. A9), the Court of Appeals clearly stated that "In our opinion, the findings of discrimination by the [District] Court are not supported by substantial evidence and are clearly erroneous."

1. The Decision of the Court of Appeals Is Consonant with the Decisions of This Court

In *James v. Valtierra*, 402 U.S. 137, 140 (1971), this Court construed the plain language of the Housing Act of 1937. 42 U.S.C. § 1415 (7), to mean exactly what it says:

> By the Housing Act of 1937 the Federal Government has offered aid to state and local governments for the creation of low-rent public housing. However, the federal legislation does not purport to require that local governments accept this or to outlaw local referendums on whether the aid should be accepted.

It is therefore clear that it is for the municipalities to decide whether they need low-rent housing and whether they desire to sign cooperation agreements. There is no basis to infer discrimination on the part of a body corporate and politic for doing what it has a lawful right to do under the express provisions of the federal housing Act. A district court has no authority to usurp the function expressly reserved to local governments, or to order a public housing

agency to prepare any plans for low-rent housing projects in municipalities which have neither requested them nor voluntarily signed cooperation agreements required for federal funding.

There is no constitutional right to public housing either in the municipality where a person resides or in a municipality in which he does not reside. The Constitution does not provide judicial remedies for every social and economic ill, and the assurance of adequate housing is a legislative, not judicial, function. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

City officials may close down a facility not touching a fundamental right, even though such action may have a greater impact on a minority group. *Palmer v. Thompson*, 403 U.S. 217 (1971). Surely a district court is not authorized to find a constitutional violation for a mere failure to provide public housing, so as to be able to invoke the court's awesome coercive and punitive powers against local governments which do not choose to accept federal aid. *Valtierra, supra.*

Moreover, the Court of Appeals was eminently correct in holding that a district court has no jurisdiction to issue orders against bodies corporate and politic like CMHA and defendant cities. *City of Kenosha v. Bruno*, 412 U.S. 507, 513 (1973). The Order issued in the action at bar was directed to CMHA (and not its officials against whom the complaint had been ordered dismissed previously) and only against the five cities. Lack of jurisdiction over bodies corporate and politic, which are not "persons" within the ambit of 42 U.S.C. § 1983, cannot be cured by joining as parties defendant the individual members of their governing bodies who have committed no constitutional violation and against whom nc relief has been or could properly be ordered.

2. The Court of Appeals Had Jurisdiction of a Final Appealable Order

In *Gillespie v. United States Steel Corporation*, 379 U.S. 148, 152 (1964), the Court held that "as this Court has often pointed out, a decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case". This Court further held that "the requirement of finality is to be given a 'practical rather than a technical construction' ". That case further indicated that an Appellate Court should give consideration to four factors in determining whether an order of a lower court is "final" within the meaning of 28 U.S.C. § 1291. The Court of Appeals analyzed these four factors and applied them to the present case (Footnote 3, 500 F.2d 1087, 1091, Petitioners' App. Pages A7-A9). The Court of Appeals' trenchant analysis effectively disposes of Petitioners' argument that the order appealed from was not a final appealable order.

Decisions in the other Circuits following *Gillespie, supra*, and *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), are consistent with the reasoning of the Court of Appeals in this action. *United States v. Doe*, 455 F.2d 1270 (1st Cir. 1972); *Herbst v. International Telephone & Telegraph Corporation*, 495 F.2d 1308 (2nd Cir. 1974); *Plymouth Mut. L. Ins. Co. v. Illinois Mid-Continent L. Ins. Co.*, 378 F.2d 389 (3rd Cir. 1967); *Jetco Electric Industries, Inc. v. Gardiner*, 473 F.2d 1228 (5th Cir. 1973); *United States v. 58.16 Acres of Land, etc.*, 478 F.2d 1055 (7th Cir. 1973); *Knickerbocker Toy Company, Inc. v. Faultless Starch Company*, 467 F.2d 501 (Ct. of Customs & Pat. Apps. 1972).

CONCLUSION

The Court of Appeals faithfully followed and applied decisions and precedents of this Court in reversing an erroneous order of the single-Judge District Court and ordering dismissal of the complaint. No novel issues are raised by the Petition, and there are no special and important reasons warranting review of the clearly-correct decision of the Court of Appeals. Inasmuch as no appeal was taken from the three-Judge Court's Order which determined that the cooperation agreement requirement of 42 U.S.C. § 1415 (7) is constitutional on its face and *as applied*, that decision is final and is res judicata as between the parties hereto. Any statute must be applied before it can have an effect, and so it was clearly erroneous, as the Court of Appeals held, for the District Court to infer a discriminatory effect from a statute conclusively found to be constitutional as applied. Likewise, no constitutional violation may be inferred from a municipality's doing what a valid federal statute allows it to do. There was no error in the common-sense decision of the Court of Appeals. Since Petitioners have shown no basis for review, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court of the United States

Supreme Court, U. S.
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October Term, 1974
No. 74-562

ARTIE MAHALEY, *et al.*,
Petitioners,

vs.

CUYAHOGA METROPOLITAN HOUSING AUTHORITY, *et al.*,
Respondents.

and

CITY OF EUCLID, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT CITIES, EUCLID, GARFIELD HEIGHTS, SOLON AND WESTLAKE IN OPPOSITION

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C. WRIGHT, FEDERAL COURTS, §101 (2d Ed. 1970) 16

Supreme Court of the United States

October Term, 1974
No. 74-562

ARTIE MAHALEY, *et al.*,
Petitioners,

vs.

CUYAHOGA METROPOLITAN HOUSING AUTHORITY, *et al.*,
Respondents,

and

CITY OF EUCLID, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT CITIES, EUCLID, GARFIELD HEIGHTS, SOLON AND WESTLAKE IN OPPOSITION

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals is reported at 500 F.2d 1087, and is contained in petitioner's appendix at page A1.

The opinion of the three-judge District Court is reported at 355 F. Supp. 1245 (N.D.Ohio 1973) and is contained in petitioner's appendix at page A34.

The opinion and order of the single-judge District Court is reported at 355 F. Supp. 1257 (N.D.Ohio 1973), and is contained in petitioner's appendix at page A58.

JURISDICTION

The judgment of the Court of Appeals was entered on July 9, 1974 (A1, A32). A petition for rehearing was denied on August 14, 1974 (A33). The petition for writ of certiorari was filed November 8, 1974. Jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. May the individuals comprising the governing bodies of five municipalities situated throughout the greater Cleveland area be found guilty of effecting an unconstitutional discrimination based on wealth or race because of their failure to enter into a public housing program when they were never given an opportunity to pass upon the matter?
2. Did the Court of Appeals correctly determine its own jurisdiction in finding that the District Court's decision under appeal was a final order within the meaning 28 U.S.C. §1291?

STATUTE INVOLVED

42 United States Code §1415(7): Local Responsibilities and Determinations.

(7) In recognition that there should be local determination of the need for low-rent housing to meet needs not being adequately met by private enterprise—

(a) The Authority shall not make any contract with a public housing agency for preliminary loans (all of which shall be repaid out of any moneys which

become available to such agency for the development of the projects involved) for surveys and planning in respect to any low-rent housing projects initiated after March 1, 1949, (i) unless the governing body of the locality involved has by resolution approved the application of the public housing agency for such preliminary loan; and (ii) unless the public housing agency has demonstrated to the satisfaction of the Authority that there is a need for such low-rent housing which is not being met by private enterprise; and

(b) The Authority shall not make any contract for loans (other than preliminary loans) or for annual contributions pursuant to this chapter with respect to any low-rent housing project initiated after March 1, 1949, (i) unless the governing body of the locality involved has entered into an agreement with the public housing agency providing for the local cooperation required by the Authority pursuant to this chapter; (ii) unless the public housing agency has demonstrated to the satisfaction of the Authority that a gap of at least 20 percentum (except in the case of a displaced family or an elderly family) has been left between the upper rental limits for admission to the proposed low-rent housing and the lowest rents at which private enterprise unaided by public subsidy is providing (through new construction and available existing structures) a substantial supply of decent, safe, and sanitary housing toward meeting the need of an adequate volume thereof.

STATEMENT OF THE CASE

This action was commenced on March 15, 1971, by the filing of a Complaint in the United States District

Court for the Northern District of Ohio, Eastern Division, on behalf of three individual plaintiffs, all Cleveland residents, two of whom are black and one is white. These individuals claimed to be eligible for public housing. Also, as party plaintiff is a nonprofit Ohio corporation, the PATH Association, whose stated purpose is to: "Increase the supply of decent housing in the greater Cleveland, Ohio area, and to make that housing available to all persons irrespective of race, class or religious persuasion."

As defendants, the plaintiffs selected at random five of the 56 municipal corporations located in Cuyahoga County, Ohio (the greater Cleveland area). Also made parties defendant were their mayors and councilmen in office at the time of the filing of the Complaint, individually and in their official capacities; the Cuyahoga Metropolitan Housing Authority (CMHA), a public housing agency, its Board and Executive Director, and the Department of Housing and Urban Development of the United States (HUD) and its Secretary, George Romney.

The action was brought as a class action with the plaintiffs allegedly representing all low income residents of the greater Cleveland, Ohio area, who by virtue of their poverty, or race, or both, were unable to secure decent and sanitary housing at rents which they could afford without the assistance of the defendant CMHA. None of the three named individual plaintiffs reside in any of the five defendant municipalities. One of the individual plaintiffs, Mahaley, resides in a CMHA project in Cleveland.

At issue in this case are certain controversies over low-rent public housing under the United States Housing Act of 1937, as amended, 42 U.S.C. §1401, et seq. Under this Federal Act, before federal funds will be made available to public housing agencies for the construction and

operation of low rent public housing within a municipality, there must be a local determination of need and "the governing body of the locality involved. . . [must have] entered into an agreement with the public housing agency providing for the local cooperation required by the Authority pursuant to this chapter. . . ." 42 U.S.C. §1415(7)(A)(1)(2) and (B) (1).

The evidence showed that none of the plaintiffs or any member of their class, or CMHA ever appeared before any of the five municipal councils, nor has there ever been a request to enter into a cooperation agreement directed to any of the five defendant councils. Further, at trial the former Chairman of the CMHA Board, who served for 27 consecutive years until 1970, testified that he had never sent a letter to any of the governing bodies of the defendant municipalities relative to a cooperation agreement. It did appear that, prior to the filing of the Complaint, one mimeographed letter was mailed by the Executive Secretary of CMHA to all mayors, city managers or other chief executives of the municipalities throughout Cuyahoga County. This letter was of an informational nature only regarding different aspects of public housing. This letter did not request that a cooperation agreement be entered into and there was no personal contact or follow up with the mayors by CMHA.

The "Cooperation Agreement" required by Section 1415(7)(B)(1) is a contract between the local housing authority and the individual municipality. The municipality must be authorized to enter into this contract through a vote of its local governing body, the Council. Among the obligations undertaken by the municipality in this contract is the obligation to hold the public housing project exempt from all real and personal property taxes. The municipality further agrees that within five years after the comple-

tion of the project it will undertake to eliminate by demolition, condemnation, effective closing or compulsory repair or improvement a number of unsafe and unsanitary dwelling units equal to the number of units in the low rent public housing project. There was no proof offered at trial that in any of the defendant municipalities there were any slums or unsafe or unsanitary dwelling units for which this provision would be effective.

In the Cooperation Agreement, the municipality further binds itself to furnish to the public housing project public services and facilities of the same character and to the same extent as are furnished to other dwellings and inhabitants of the municipality. The municipality agrees to vacate such streets, roads and alleys within the area of the project as may be necessary and proper to the development thereof, and to convey without charge to the housing authority such interest as the municipality may have in such vacated areas. Further, the municipality agrees to remove from the vacated areas all public or private utility lines and equipment without cost or expense to the housing authority and further agrees (to the extent it may lawfully and properly do so) to grant deviations from its zoning and building codes to promote economy and efficiency in the development and administration of the project. In lieu of payment of its taxes, the housing authority pays 10% of the "shelter rent" generated by the project, basically gross rent minus utilities, to the County Auditor for distribution in the same manner that real and personal property taxes would be distributed if the project were not tax exempt. Although this 10% payment in lieu of taxes does generate some revenue to the municipality the evidence indicated that the payment is a small fraction of the real and personal property taxes that would be generated by like projects which were not tax exempt.

At trial, there was no evidence introduced to show that any one of the five defendant municipalities had significant housing problems. There was no showing that there were any slums or sub-standard housing units within the five municipalities. There was no showing that any present resident of CMHA housing came from any one of the five defendant municipalities or that any resident of the defendant municipalities was presently on the waiting list for CMHA housing. While there was some evidence introduced to show that residents of each of the municipalities qualified for welfare payments which, in turn, would qualify them for CMHA housing on the basis of income alone, there was no showing that any of these persons had housing problems, required public housing or even desired or requested public housing in their municipality.

REASONS FOR DENYING CERTIORARI

I. THERE HAS BEEN NO DENIAL OF EQUAL PROTECTION TO THE PLAINTIFF CLASS.

Under the facts of the present case, the governing bodies of the five defendant municipalities never made a decision concerning whether to enter into a cooperation agreement, and thus, took no "action" which would deny a protected class the equal protection of the laws. Further, even assuming that inaction when there is a duty to act is sufficient to satisfy the "state action" requirements of 42 U.S.C. §1983, the mere fact that the councils have not entered into a cooperation agreement, as they are authorized to do under the United States Housing Act, simply does not prove the violation of anyone's constitutional rights.

The Court of Appeals correctly followed this Court's holding in *James v. Valtierra*, 402 U.S. 137 (1971)[1] where this Court stated:

> "By the Housing Act of 1937 the Federal Government has offered aid to state and local governments for the creation of low-rent public housing. However, the federal legislation does not purport to require that local government accept this or to outlaw local referendum on whether the aid should be accepted.
>
> . . .
>
> "The people of California have also decided by their own vote to require referendum approval of low-rent public housing units. This procedure insures that all the people of the community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues. It gives them a voice in decisions that will affect the future development of their own community. This procedure for democratic decision making does not violate the constitutional command that no State shall deny to any person 'the equal protection of the laws.'" 402 U.S. at 140, 142-143.

The evidence in the *Valtierra* case and the instant case are essentially identical. In both cases there was a waiting list for low-rent public housing.[2] In both cases,

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1. At the time the instant Complaint was filed on March 15, 1971, the District Court's opinion in *James v. Valtierra* was still in force. 313 F. Supp. 1 (N.D.Cal. 1970) (three-judge court). The allegations of the Complaint in the instant case closely parallel the findings of the District Court in *Valtierra*. Subsequently, on April 26, 1971, this Court reversed the District Court in *James v. Valtierra*, 402 U.S. 137 (1971).

2. In *Valtierra* the waiting list was comprised, in part, from residents of the jurisdictions where the referendums were conducted. In our case, however, the list is comprised of residents of municipalities other than the defendant municipalities.

the majority, but by no means all, of the applicants for low-rent public housing were from minority groups. In both cases, there was no showing of purposeful discrimination by any local official. In both cases it was shown that public low-rent housing projects are financed through bonds issued by the local authority, and that the local governmental body must agree to provide all municipal services for the units and to waive all taxes on the property. In both cases, the plaintiffs' argument was similar; namely, the "special burden" of local government approval works an unconstitutional discriminatory effect either based on race or poverty on those who have applied for low rent public housing. This Court answered that argument as follows:

> "But of course a law making procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision for a filibuster rule is likely to 'disadvantage' any of the diverse and shifting groups that make up the American people." 402 U.S. at 142.

Simply stated, assuming that the five municipal councils' "inaction" had a basis of classifying into two groups. there was no showing that the inaction was based upon an "inherently suspect" classification such as race, alienage or national origin, or that the municipal councils' inaction impinged upon a "fundamental interest" such as the right to vote or the right to appeal a criminal conviction or the right to interstate travel that would subject the municipal councils' inaction to "strict" or "close judicial scru-

tiny". In fact, this Court has held in *Lindsey v. Normet*, 405 U.S. 56, 74 (1972):

> "We do not denigrate the importance of decent, safe and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or recognition of any right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative not judicial functions."

Racial discrimination was not proved in this case, and under the more relaxed "rational relationship" test, it is not a violation of the Equal Protection Clause of the 14th Amendment for the individual members of a municipal governing body not to seek out and enter into a cooperation agreement with a local public housing authority when it was shown that the individuals were never requested to enter into the cooperation agreement; when it was shown that the municipality would be required to undertake substantial financial obligations pursuant to the cooperation agreement; when it was shown that the persons in need of the public housing resided in another municipality; and when the federal statute creating the public housing program specifically gave the local municipality the sole right to determine its need and desire to enter into the program. *James v. Valtierra, supra; Lindsey v. Normet, supra; San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Richardson v. Belcher*, 404 U.S. 78 (1971); *Palmer v.*

Thompson, 403 U.S. 217 (1971); *Dandridge v. Williams*, 397 U.S. 471 (1970); *McGowan v. Maryland*, 366 U.S. 420 (1961).

All of the cases on which the petitioners rely involve either the refusal of a governmental body to grant benefits equally to all or conscious governmental obstruction of specific private projects beneficial to minority groups or to integration within their own jurisdiction. See, e.g., *United Farm Workers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799 (5th Cir. 1974) (City refusal to extend water and sewer service to low income housing project although it had extended service to other developments); *Banks v. Perk*, 341 F. Supp. 1175 (N.D. Ohio 1972), *aff'd in part, rev'd in part*, 473 F.2d 910 (6th Cir. 1973) (City refused to issue building permit for low income housing project and restricted such projects to segregated neighborhoods); *Crow v. Brown*, 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd*, 457 F.2d 788 (5th Cir. 1972) (per curiam) (County officials refused to issue building permits for low income housing project); *Gautreaux v. Chicago Housing Authority*, 436 F.2d 306 (7th Cir. 1970), *cert. denied*, 402 U.S. 922 (1971); (City effectively restricted low income housing project to segregated neighborhoods); *Kennedy Park Homes Association v. City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971) (City regional parcel to prevent construction of low income housing project); *Dailey v. City of Lawton*, 425 F.2d 1037 (10th Cir. 1970) (City denied building permit and zoning change to low-income housing project)

In contrast to the foregoing cases, the petitioners here seek not to remove governmental obstacles to a specific proposed housing project but rather to impose upon the respondents that affirmative duty to undertake a social and economic program to construct housing of a particular

nature for particular persons regardless of the municipal priorities. This is clearly not required by the Equal Protection Clause of the 14th Amendment to the United States Constitution and is contrary to what was intended by Congress in the Housing Act of 1937 as amended. *Lindsey v. Normet, supra; Palmer v. Thompson, supra; Acevedo v. Nassau County,* 500 F.2d 1078, 1081 (2d Cir. July 2, 1974); *Ybarra v. Town of Los Altos Hills,* 370 F. Supp. 742 (N.D. Cal. 1973), *affirmed* ..... F.2d ....., slip op. no. 73-2070 (9th Cir. Sept. 6, 1974); *Citizens Committee for Faraday Wood v. Lindsay,* 362 F. Supp. 651 (S.D. N.Y. 1973), appeal docketed no. 73-2590 (2d Cir. Oct. 2, 1973).

II. THE LOW-RENT PUBLIC HOUSING PROGRAM IS A LOCAL OPTION PROGRAM AND THE PEOPLE OF OHIO, THROUGH THEIR CONSTITUTION, HAVE DELEGATED TO THE MUNICIPAL GOVERNING BODIES THE SOLE AUTHORITY TO DETERMINE WHETHER TO ENTER INTO THE PROGRAM.

As the Federal Low-Rent Housing Program was envisioned, the initial determination of whether the private housing market had failed, whether there were significant slums or areas of blight which needed to be eliminated, or whether the local governmental unit desired to bear the expense of participation in the program would be placed in the hands of the governing body of the various localities. Thus, the program is totally a "local option" program. The local public housing authorities were created to administer and operate the project and the federal government plays the role of a "silent partner", providing financial assistance in the form of annual contributions or annual contracts for loans, and furnishing technical aid and advice. 42 U.S.C. §1415(7)(B). As was stated in Senate Report 84, February 25, 1949, to accompany S. 1070, 2 U.S. Cong. Service 1550, at 1552 and 1556 (81st Cong. 1st Sess. 1949):

"The Bill [S. 1070] * * * is based upon the firm foundation that, although the housing problem is obviously national in scope, it is fundamentally a local problem and that the responsibility for its solution therefore rests with the local community. This bill leaves that primary responsibility with the local communities where it belongs. It recognizes that the need for any kind of housing action should be determined locally * * * It therefore provides that Federal assistance for low-rent public housing shall be available only for projects where there has been a local determination, by the governing body of the community, that such housing is required in order to meet needs not being adequately met in that community by private enterprise, and where such projects are locally initiated, locally developed and locally managed * * * With this clear understanding this bill then gives full recognition to the fact that there are many ways that the Federal Government can and should render assistance to such local communities as they themselves determine and that they need and want that assistance in order to help them meet the housing problems effectively * * *

The prime responsibility for the provision of low-rent housing is in the hands of the various localities."

The people of Ohio through their Constitution, Article XVIII, Section 3, have delegated all powers of local self-government to the governing body of their municipalities. It is the local governing bodies, in this case, the councilmen, who are the elected representatives of the people and who determine the priorities for municipal development, municipal taxation, and the provision of municipal services to their residents. Further, in Ohio, the decision of whether to permit a municipality to enter into a federal

local option program rests with the municipal council. *State ex rel. Ellis v. Sherrill,* 136 Ohio St. 328, 25 N.E.2d 844 (1940); *State ex rel. Bruestle v. Rich,* 159 Ohio St. 13, 110 N.E.2d 778 (1953); *Grisanti v. City of Cleveland,* 18 Ohio Op. 2d 143, 179 N.E.2d 798 (Cuyahoga Co. C.P. 1961), *aff'd,* 81 Ohio Law Abs. 1, 81 N.E.2d 299 (Cuyahoga Co. Ct. App.), *app. dism.,* 173 Ohio St. 386, *app. dism.,* 371 U.S. 68 (1962). A strong presumption of validity attaches to the governing body's determination. As was stated in *State ex rel. Gordon v. Rhodes,* 156 Ohio St. 81, 100 N.E.2d 225 (1951):

> "The determination of what constitutes a public municipal purpose is primarily a function of the legislative body of the municipality, subject to review by the court, and such determination by the legislative body will not be overruled by the courts except in instances where that determination is manifestly arbitrary or unreasonable." 156 Ohio St. at 81.

In the instant case there was not a scintilla of evidence that any representative of CMHA or of the plaintiffs ever requested an appearance or appeared before the City Council of any of the defendant municipalities to request that they or any of them approve a low-rent housing project or that they enter into a cooperation agreement. The Court of Appeals was factually correct when it stated:

> "The governing bodies of the five municipal defendants were never given an opportunity to pass upon the matter; nevertheless, they were charged with discrimination against blacks for failure to take affirmative action." 500 F.2d at 1094 (A14) (footnote omitted).

We submit that the instant case presents the same issue to this Court that was presented and resolved by it only last July in *Milliken v. Bradley,* ..... U.S. .....,

41 L. Ed. 2d 1069 (July 25, 1974). The following language from *Milliken* is equally applicable to the instant case:

> "But it is obvious from the scope of the inner-district remedy itself that absent a complete restructuring of the laws of Michigan relating to school districts the District Court will become first, a de facto 'legislative authority' to resolve these complex questions, and then the 'school superintendent' for the entire area. This is a task which few, if any, judges are qualified to perform and one which would deprive the people of control of the schools through their elected representatives." ..... U.S. at ....., 41 L. Ed. 2d at 1090-91.

We submit that the Court of Appeals was correct in finding that the District Court lacked authority or jurisdiction over the local councilmen under the facts presented herein to consider whether to affirmatively order them to embark upon a social or economic program under the guise of interpretation of the Equal Protection Clause. See *Carter v. Jury Commission*, 396 U.S. 320 (1970); *Mayor of Philadelphia v. Educational Equality League*, ... U.S. ....., 39 L. Ed. 2d 630 (March 25, 1974).

III. THE ORDER APPEALED FROM IS A FINAL ORDER WITHIN THE MEANING OF 28 U.S.C. §1291.

The trial court's decision was appealed to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. §1291 which provides that federal Courts of Appeal have jurisdiction of appeals from "all final decisions of the district courts." Both the plaintiff-appellees, Artie Mahaley, et al., and the defendants-appellees, CMHA, et al., filed motions to dismiss the appeal on the grounds that the Court of Appeals

lacked jurisdiction. By separate order of December 3, 1973, the Court of Appeals determined that it had jurisdiction, relying upon *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), and, accordingly, overruled the motions to dismiss. At oral argument on February 13, 1974, the issue of the Court of Appeals' jurisdiction was again raised. Accordingly, the Court reexamined its jurisdiction and again found that it had jurisdiction to review the trial court's decision pursuant to 28 U.S.C. §1291. See Court of Appeals' Opinion at footnote 3, 500 F.2d at 1090 (A7). It is our opinion that the Court of Appeals correctly determined its own jurisdiction.

This Court has been inclined to follow a "pragmatic approach" to the question of finality. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). It has stated that a decision, within the meaning of Section 1291, "does not necessarily mean the last order possible to be made in a case." *Gillespie v. United States Steel Corp.*, 379 U.S. at 152. See also *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). More recently, in dictum, this Court has indicated that in certain classes of cases, such as school desegregation cases, where complex issues are involved and continuing trial court involvement may be envisioned, "many final orders may issue in the course of litigation." *Bradley v. Richmond School Board*, ... U.S. ....., 40 L. Ed. 2d 476, at 495 (May 15, 1974). The entry of any order that determined substantial rights of the parties may be appealed pursuant to §1291. *Gillespie, supra;* See C. WRIGHT, FEDERAL COURTS, §101 (2d Ed. 1970).

The Court of Appeals in footnote 3 of its decision, 500 F.2d at 1090 (A7-A9) indicates that the District Court's opinion possesses four attributes of finality; namely (1) that the District Court had determined which legal test to apply to judge the defendants' actions; (2) that in

applying this legal test the District Court had found a violation of 42 U.S.C. 1983; (3) that the defendants would be placed at great inconvenience and cost to participate in further superfluous proceedings before the District Court with the result a foregone conclusion, and (4) that precedent from this Court compelled a finding of finality.

In short, the District Court's opinion determined substantially all of the rights of the parties and was properly appealable under §1291.

CONCLUSION

Respondents believe that the Court of Appeals was bound by this Court's holding in *James v. Valtierra*, 402 U.S. 137 (1971), as the Court of Appeals acknowledged. Since the Court of Appeals followed the controlling precedent of this Court, we would submit that there are no other issues of significance which would merit the review of this Court. Because the individuals comprising the governing bodies of the defendant municipalities were never given an opportunity to pass upon whether to permit their municipalities, to enter into the local option, low-rent public housing program, the Court of Appeals was correct in finding that all the issues passed upon by the three-judge District Court bound the single-judge District Court to find for the defendants. Even further, the Court of Appeals was correct in determining under the facts presented herein that a district court did not have jurisdiction over individual council members to consider whether to affirmatively order them to embark upon a social or economic program under the guise of interpretation of the Equal Protection Clause. Lastly, the Court of Appeals was correct in ruling that the District Court had deter-

mined substantially all of the rights of the parties and that its decision was a properly appealable final order.

For all the foregoing reasons, respondents repsectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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